83-821

No.



# In the Supreme Court of the United States

**October Term, 1983**

WHITE HYDRAULICS, INC., HARVEY C. WHITE, and HOLLIS N. WHITE, JR.,
*Petitioners,*

vs.

SAUER-GETRIEBE, KG,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI
**To the United States Court of Appeals**
**For the Seventh Circuit**

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## QUESTIONS PRESENTED

1. Upon the judicial power of the United States being invoked by a party to a contract seeking the adjudication of the validity of the contract, may the exercise of such judicial power be delegated or conferred to persons not having the attributes or characteristics of judges authorized in Article III of the Federal Constitution?

2. Does the inclusion of an arbitration clause in a commercial contract between a United States corporation and a German corporation, providing for arbitration to take place in London, England, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce before three arbitrators (not judges appointed under Article III of the Federal Constitution and not necessarily lawyers) authorize a United States court to delegate or confer upon such arbitrators the judicial power to adjudicate the validity of the contract under which they purport to act?

3. Does the consent to arbitration by parties to a contract containing an arbitration clause constitutionally permit or sanction a United States court, before which court a party to the contract has petitioned for an adjudication of the validity of the contract, to transfer the judicial power to adjudicate such issue of contract validity to the arbitrators who are not judges appointed under Article III of the Federal Constitution?

4. Can the judicial power of the United States invoked by a party to a private commercial contract seeking before a United States court an adjudication of the validity of the contract, be assigned or conveyed by such United States court to persons acting as arbitrators pursuant to an arbitration clause in the contract but who are not judges

holding office under Article III of the Federal Constitution?

5. Can Congress by enacting arbitration statutes providing that arbitration clauses in contracts are valid and enforceable deprive citizens of the constitutional right to have the validity of the contract adjudicated by an Article III judge?

6. Was the action of the Court of Appeals below constitutional in refusing to exercise judicial power of the United States to adjudicate the validity of a contract between private parties, one a German corporation and the other an Indiana corporation, and instead bestowing such judicial power upon three arbitrators in London, England?

## RULE 28.1 STATEMENT

There are no parent companies and no subsidiaries of White Hydraulics, Inc. All of its stock is held by Harvey C. White and Hollis N. White, Jr.

## TABLE OF CONTENTS

Appendix:

## TABLE OF AUTHORITIES

### Cases



### Federal Constitution



### Statutes

*To The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your Petitioners, White Hydraulics, Inc., Harvey C. White, and Hollis N. White, Jr., respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered August 22, 1983.

## CITATIONS TO OPINIONS BELOW

The opinion and judgment of the Circuit Court of Appeals for the Seventh Circuit, of which review is requested, is printed in the Appendix (App. A1, A18) to this Petition, and was reported at 715 F.2d 348.

The decision and judgment of the United States District Court for the Northern District of Indiana, Hammond Division, are printed in the Appendix (App. A10, A16) respectively, to this Petition, and reported at ..... F. Supp. .....

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 22, 1983 (App. A18).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Article III, Section 1:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

The federal statutes involved or to be considered are:

9 U.S.C. 2 dealing generally with validity of agreements to arbitrate (App. A20).

9 U.S.C. 201 providing for recognition and enforcement of foreign arbitral awards (App. A20).

35 U.S.C. 294(a) directed to arbitration agreements relating to disputes under patent licenses (App. A22).

## STATEMENT UNDER SUPREME COURT RULE 28(.4)(b)

Since the proceeding draws into question the constitutionality of the Act of July 30, 1947, c.392, 61 Stat. 670, 9 U.S.C. 2; of the Act of July 31, 1970, 84 Stat. 692, 9 U.S.C. 201; and of the Act of August 27, 1982, 96 Stat. 322, 35 U.S.C. 294, Acts of Congress affecting the public interest, and neither the United States nor any agency,

officer or employee thereof is a party, it is noted that 28 U.S.C. 2403(a) may be applicable.

No court of the United States as defined by 28 U.S.C. 451 has, pursuant to 28 U.S.C. 2403(a), certified to the Attorney General of the United States that the constitutionality of such Acts of Congress has been drawn in question.

## STATEMENT OF THE CASE

The Petitioners are White Hydraulics, Inc., an Indiana corporation which at all times mentioned here was located at Lafayette, Indiana, and the White brothers, Harvey C. White and Hollis N. White, Jr., owners in equal amounts of all the corporate shares of White Hydraulics, Inc., and inventors of the patented hydraulic motors manufactured by White Hydraulics, Inc. The Petitioners sometimes will herein be collectively referred to as the "Whites" unless indicated by their individual names.

The Respondent, Sauer-Getriebe KG (sometimes herein referred to as "Sauer") is a partnership organized under the laws of the Federal Republic of West Germany, with a principal place of business in the Federal Republic of West Germany. The Respondent's partners are corporations organized and existing under the laws of the Federal Republic of West Germany, whose principal places of business are in the Federal Republic of West Germany.

Sauer and White Hydraulics, Inc. entered into a written contract (App. A23) on June 29, 1979 which contract dealt with the sale of certain hydraulic motors to Sauer by White Hydraulics, Inc., the motors to be resold exclusively by Sauer in a certain territory. This territory was described as Europe and other countries totalling 47 countries.

The contract also provided for the transfer under certain conditions of described manufacturing rights, including patent rights and trade secrets, to enable Sauer itself to manufacture and sell exclusively in the 47 countries the subject hydraulic motors particularly identified in the contract.

The contract contained the following arbitration clause (App. A35):

> "F. Any and all disputes arising out of and in connection with this Agreement shall be finally settled by arbitration under the rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the Rules. The arbitration shall take place in London, United Kingdom of Great Britain."

The contract was prepared in Germany by Sauer's German lawyer in the German language, translated into English, signed in Germany by Sauer and then sent to White Hydraulics, Inc., in Lafayette, Indiana, where it was then signed by White Hydraulics, Inc.

The District Court, after noting the above circumstances of the contract's drafting and execution, in its opinion (App. A13) found that "The June 29, 1979 contract is vague and ambiguous in several respects including:" and then itemized five different points and provisions in the contract that were so found to be "not certain nor reasonably ascertainable" (App. A13-A14).

After finding as above stated, the District Court ruled:

> "Under controlling law, a contract so drafted by one party is to be construed and interpreted most strongly and strictly against the party so drafting the contract and most favorably for the other party.

> Therefore, in any proceeding concerning the performance of the contract by the parties, including any arbitration proceedings that may take place, the uncertainties, ambiguities, and vague terms in the contract of June 29, 1979 must be construed and interpreted most strongly in favor of defendants (Whites) and most strongly against the plaintiff (Sauer)." (App. A14.)

In July of 1981, the White brothers advised Sauer of negotiations by the White brothers with a third party for sale of their corporate stock of White Hydraulics, Inc.

On August 14, 1981 Sauer invoked the judicial power of the United States by filing in the United States District Court for the Northern District of Indiana its Complaint (App. A37) charging the Whites with "repudiating" the contract of June 29, 1979, and praying that the Whites be enjoined from transferring to third parties the manufacturing rights referred to in the contract, pending arbitration of the dispute.

On or about August 24, 1981 Whites invoked the judicial power of the United States by filing in the District Court their Answer and Counterclaim (App. A45) in which the Whites stated their defenses to the action, including a denial that they had repudiated the contract and a denial that the contract was valid. A charge that the Whites also asserted was that Sauer had waived the right to arbitration by proceeding to file its Complaint and thereby electing litigation instead of arbitration. Sauer thereupon filed its Reply (App. A48) to the Counterclaim.

In addition, the Whites invoked the judicial power of the United States by seeking in their Counterclaim a declaratory judgment that the contract was invalid, void, of no effect, and unenforceable for several reasons, including:

(1) The contract was vague, uncertain, and indefinite in several respects including a number of provisions there set forth in more detail.

(2) The contract and the covenants thereof are not supported by good and valid consideration in several respects, including an absence of any promise by Sauer, nor any obligation assumed by Sauer, to buy any hydraulic motors or to do anything else, although reciting an "intent" by Sauer to purchase 50,000 hydraulic motors.

(3) The contract is unenforceable in a court of equity because unconscionable and inequitable in nature in foreclosing White Hydraulics, Inc. from selling hydraulic motors in the territory of 47 countries claimed by Sauer while not imposing upon Sauer the legal obligation to buy any hydraulic motors from White Hydraulics.

Before trial, but some five months *after* invoking the jurisdiction of the Court by filing its Complaint on August 14, 1981, Sauer on or about January 16, 1982, filed its Demand for Arbitration with the office of the International Chamber of Commerce in Paris. Whites in response stated their objections to the demand for arbitration on the grounds (1) that the arbitrators were not competent to adjudge the validity of the contract under Indiana law, (2) that Sauer had five months previously elected to proceed by litigation in the courts rather than by arbitration, and (3) that the arbitration clause in the contract called for the arbitration proceeding to be held in London, England, not in Paris, France.

Arbitration proceedings have not gone forward pending termination of this litigation.

Following trial, the District Court found that the Whites had not repudiated the contract, and dismissed the Complaint. The District Court also dismissed the Coun-

terclaim, stating "there is insufficient evidence to establish the invalidity of the contract as asserted by" the Whites (App. A15).

Notwithstanding the dismissal of White's Counterclaim for "insufficient evidence to establish the invalidity of the contract", the District Court did conclude as being present in the contract the five different provisions and features in the contract which were vague, uncertain and ambiguous (App. A13-A14). The District Court gave a *warning and admonition*. This judgment of the District Court was that, *under controlling law*, in all further proceedings, including any arbitration proceedings, all the uncertainties, ambiguities and vague terms in the contract *must be construed and interpreted* most strongly in favor of the Whites and most strongly against Sauer (App. A14). This warning and admonition by the District Court afforded to the Whites some limited protection under the law, but not all of the relief that had been sought by them upon invoking the judicial power of the United States.

Later, the Whites again invoked the judicial power of the United States by filing an appeal to the Seventh Circuit Court of Appeals. In this appeal, the Whites sought to have the Court of Appeals declare the contract to be invalid on the same several grounds that they had urged upon the District Court, citing in support of a ruling of invalidity the contract law of Indiana (the location of the forum court is Indiana; Indiana is the location where the contract was signed by the Whites; and Indiana is the location where the contract was to be performed).

The Court of Appeals was also asked to affirm the District Court's finding that the Whites had not repudiated the Contract, a finding that, absent any evidence whatsoever to contradict it, was not clearly erroneous.

In addition, the Court of Appeals was asked to enjoin Sauer from proceeding with arbitration because it had waived arbitration and principally because the contract under which the arbitrators in London, not necessarily even being lawyers, would purport to act at all was invalid and consequently, *they could not exercise judicial power to adjudicate their own authority and capacity to act as arbitrators.*

The Court of Appeals in its decision (App. A1) ruled fully for Sauer and entirely against the Whites. It ruled (App. A3):

> "For the reasons that follow, we affirm the dismissal of White's counterclaim but vacate the remainder of the judgment and *direct the District Court to enjoin White* from repudiating the contract and from transferring any of Sauer's contractual rights to a third party until the arbitration requested by Sauer is completed and this lawsuit (including any appeals) is terminated."*

The essence of the basis for the Court of Appeals' decision is found in its statements (App. A4):

> "Moreover there is *nothing* that requires that courts rather than arbitrators decide the validity of contracts."
>
> • • • • •
>
> "It is too late for White to argue that arbitrators appointed under ICC rules *lack the competence to adjudicate* the validity of its contract. Had White thought so when it entered the contract, it would not have agreed to arbitrate 'any and all claims' before them."

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*Emphasis supplied throughout.

Not only did the Court of Appeals refuse to hold the contract to be invalid for the several reasons urged upon it by White and instead held that this issue of validity was for the arbitrators, but the Court of Appeals *even withdrew and canceled* the limited amount of protection given to White by the District Court concerning the construction and interpretation of the contract in further proceedings. The District Court (App. A14) had ruled that by reason of the contract having been drafted by Sauer's lawyer and having been then sent to the Whites for signature, under controlling law all of the several listed points of ambiguities, uncertainties, and indemnities in the contract should be construed and enforced in favor of White and against Sauer.

In denying to White the limited protection, the Court of Appeals held (App. A7):

> "Since the parties agreed to arbitrate *all disputes* arising from the contract, these findings (by the District Court) *are not binding and should be disregarded* in any subsequent arbitration proceeding."

By this subtraction of what little White had obtained by invoking the jurisdiction of the United States District Court in seeking judicial adjudication of the contract, the Court of Appeals emphasized its view and holding that the courts have no business in taking part in such controversies over a contract between private parties. Rather, the Court of Appeals in effect warned the District Court not to exercise such judicial power in case of any controversy involving a contract containing an arbitration clause.

Going further in the matter the Court of Appeals while ruling completely for Sauer upon the basis of the Court's view of the omnipotent authority of arbitrators

rather than the courts in adjudicating the validity of contracts, directed that an injunction be issued against the Whites.

Although the District Court found no evidence that White had ever "repudiated" the contract, the Court of Appeals ruled (App. A8) that Whites had "repudiated" the contract when in their defense they attacked the validity of the contract on four separate grounds. The Court of Appeals held that asserting such defenses constituted four instances of "repudiation" by the Whites.

There is nothing whatever in the record even tending to show any "threat" by the Whites to transfer manufacturing rights to third parties. (The White brothers in July, 1981, had stated that they were then negotiating the sale of their corporate stock in White Hydraulics, Inc., which stock they still own.) The Court of Appeals nevertheless proceeded as though such a "threat" had been made.

Based upon such views, the Court of Appeals directed that the cause be remanded to the District Court with directions for it to enjoin Whites from "repudiating" the contract and from transferring the manufacturing rights to a third party.

*To the limited degree of this direction* for an injunction against the Whites, the Court of Appeals (inconsistent with its views that the courts could not exercise judicial power in the case of contracts containing an arbitration clause), exercised such judicial power of the United States rather than delegating this *particular ruling* for an injunction to the arbitrators.

## REASONS FOR GRANTING RELIEF

**1. The Court of Appeals Unconstitutionally Delegated to Three Arbitrators the Judicial Power of the United States That Had Been Invoked by the Parties to a Commercial Contract Seeking the Adjudication of the Validity of the Contract Containing an Arbitration Clause.**

This Court has held that the judicial power of the United States cannot be delegated by a United States Court to bankruptcy judges appointed by a district court under provisions of the Bankruptcy Reform Act of 1978 (11 U.S.C. 101 et seq.) and acting under the grant of authority of the judicial code (28 U.S.C. 1471 et seq.), because such *bankruptcy judges* are not judges having the attributes and characteristics of judges holding office under the provisions of Article III (Section 1) of the Federal Constitution (often referred to as "Article III Judges").

*Northern Pipeline v. Marathon Pipeline*, ..... U.S. ....., 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982).

In noting the scope of the authority that had been attempted to be vested by Congress in bankruptcy judges, this Court observed:

> "The judges of the bankruptcy courts are vested with all of the 'powers of a court of equity, law and admirality'."

The Court then warned that:

> "The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III."

Distinguishing between rulings in purely bankruptcy matters and rulings in a controversy between private parties over a contract, this Court said:

> "But the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the *adjudication of state-created rights, such as the right to recover contract damages* that is at issue in this case. The former may be a 'public right' but the latter obviously is not."

Pointing out that state-created rights such as those arising out of contracts between private parties are to be distinguished from public rights created by the government, and noting that the judicial power of the United States to adjudicate such private contract rights can only be exercised by Article III judges, this Court said:

> "The power to adjudicate 'private' rights must be vested in an Art. III court * * *"

The attempt by the Bankruptcy Act to confer judicial power to adjudicate disputes between private parties to a contract was characterized by the Court by the statement:

> "Rather suggest *unwarranted encroachments* upon the judicial power of the United States, which our Constitution reserves for Art. III courts."

A controversy between private parties concerning performance of a contract is based on a state-created right, as in the instant case, and can only be adjudicated by an Art. III judge, as noted by the Court:

> "Indeed, the case before us, which centers upon appellant Northern's claim for damages for breach of contract and misrepresentation, involves a right created by state law * * *."

The unconstitutional aspect of the Bankruptcy Act to bestow power upon the bankruptcy judges to adjudicate such controversies was emphasized by the Court's comment:

> "We conclude that Sec. 241(a) of the Bankruptcy Act of 1978 has impermissibly removed most, if not all of the 'essential attributes of the judicial power' from the Art. III district court and has *vested these attributes in a non-Art. III adjunct.*"

Warning that the power to adjudicate such controversies over state-created rights, such as involved in a breach of contract action, cannot be delegated, the Court added:

> "Because the immediate controversy in this case—Northern's claim against Marathon—arises out of state law, it *may only be adjudicated, within the federal system,* by an Article III court."

It follows from the law so clearly stated in *Northern Pipeline v. Marathon Pipeline,* ..... U.S. ....., 102 S. Ct. 2858, 73 L. Ed. 2d 598 that the attempted delegation by the courts below to three persons purporting to sit as arbitrators in London, England, of the judicial power of the United States to adjudicate the validity of the subject contract, was unconstitutional.

**2. The Inclusion of an Arbitration Clause in a Contract Cannot Constitute Such a "Consent" as to Permit the Validity of the Contract to Be Adjudicated by Arbitrators Exercising United States Judicial Power Reserved by the Constitution to Article III Judges.**

Following the constitutional principle enunciated in the above 1982 decision of this Court, the Court of Appeals

for the Ninth Circuit on August 5, 1983, decided the case of:

> *Pacemaker Diagnostic Center v. Instromedix*, 712 F.2d 1305 (1983).

In this *Pacemaker* decision the Ninth Circuit Court of Appeals held that the judicial power of the United States could not constitutionally be *delegated to magistrates*. It held unconstitutional Section 636(c) of the Magistrate's Act [28 U.S.C. 636(c)] which allows magistrates, even with the consent of the parties to conduct civil trials and to enter judgments.

The action was one for patent infringement and the magistrate had held in a final judgment the patent to be valid but not infringed. The Court of Appeals reversed the magistrate's judgment and remanded the action for a *de novo* review by the district court.

*Both* the Congress and the district courts were involved in this unconstitutional delegation of the judicial power of the United States. Congress enacted the Magistrates Act and the district courts under that Act proceeded to designate the magistrate to exercise the judicial power. This exercise of judicial power under the act had to be *with the consent* of the parties. The Court there said:

> "The 1979 amendments to Magistrates Act, among other changes, 28 U.S.C. 636(c), which *confers judicial power on the magistrates, with consent of the parties,* to conduct any and all proceedings in a jury or non-jury case and order the entry of judgment, 28 U.S.C. 636(c)(1). The magistrate must be specially designated by the district court to exercise this jurisdiction. *Id.* Procedures are set up to prevent district judges or magistrates from coercing the parties to give their consent. * * * Appeals from the magistrates' judgment

may be taken to the court of appeals in the same manner as an appeal from any other judgment of the district court. 28 U.S.C. 636(c)(3). Alternatively, the parties may consent to have the appeal heard by the district court. 28 U.S.C. 636(c)(4)."

"Magistrates are clearly not Article III judges."

Ruling that the *consent* of the parties to the delegation of judicial power to the magistrate does *not* make the delegation constitutional, the court of appeals in that case said:

"Therefore, rather than being exclusively a due process right of the litigants, the requirement of an Article III judge is jurisdictional and thus *not waivable*.

* * * * *

"We believe that the Constitution establishes a framework of government that cannot be altered by statute *nor waived* by litigant consent." (Emphasis added.)

The fact that the judicial branch of the government is involved by the district courts designating the magistrates to exercise the judicial power, as well as the Congress enacting the Magistrates Act authorizing such designation, does not allow to be delegated to others the judicial power reserved by Article III of the Constitution to Article III Judges. The judicial power of the United States *cannot be internally delegated* within the judicial branch of government from district judges to magistrates. The constitutional protection to citizens afforded by Article III cannot be withdrawn nor diminished by the executive, the legislative, nor the judicial branches of the government. The court pointed this out by noting:

"Threats to the judicial decision maker's independence from within the judicial branch, however, may be just as serious as those from the executive or legislative branches.

• • • • •

"We conclude that *internal delegation* does not elevate Sec. 636(c) to the attributes demanded by Article III."

The provision in the Magistrates Act which authorizes *an appeal* from the magistrate's entry of final judgment after a trial, does *not* save the judgment from being unconstitutional because rendered by a person not an Article III Judge. It was observed in that decision by the Ninth Circuit Court of Appeals that:

"The magistrate makes the ultimate decision and *enters a final judgment*. Thus the provision cannot pass constitutional muster as authorizing an adjunct function of the district court."

Even if the judges hearing the *appeal* are Article III Judges, that will not satisfy the requirements of Article III of the Constitution. Relying upon the *Northern Pipeline* decision of this Court (directed to the Bankruptcy Act) and discussed above, the Ninth Circuit Court of Appeals stated:

"*Northern Pipeline* even more emphatically rejects the appellate review argument.

• • • • •

"The plurality (in *Northern Pipeline*) later stated that the text of Article III and the Court's 'precedents make it clear that the constitutional requirements for the requirements of judicial power must be set at *all*

*stages of adjudication, and not only on appeal'* (102 S. Ct. at 2879 n.39).

"We conclude that appellate review by the District Court will not save section 636(c)."

The Ninth Circuit Court of Appeals in its *Pacemaker Diagnostic* decision placed emphasis upon the invocation of the judicial power of the United States courts (as the parties did here). In *dictum*, the court appeared to make a distinction between arbitration situations in which the judicial power of the United States is not invoked at any stage of the proceeding, even for the enforcement of the arbitrator's award, and those situations wherein the judicial power of the United States is invoked by a party, when it reasoned or explained:

"An arbiter may render a decision, but its effects flow from the contractual agreement to abide by it, not from the exercise of judicial power. The arbiter has no authority to enter a judgment, and the parties must look to the courts for enforcement of an arbitration award. Also, an arbiter's decision is generally *not subject to judicial review on the merits.* * * * By contrast when parties agree to trial *by magistrate*, they are invoking the judicial system."

When this purported distinciton of arbitration situations from magistrate situations attempted to be made by the Ninth Circuit Court of Appeals decision in *Pacemaker Diagnostic* is reviewed and considered in the light of the principle of constitutional law stated by this Supreme Court in *Northern Pipeline v. Marathon Pipeline*, ..... U.S. ....., 102 S. Ct. 2858, then the attempted distinction will not be found to be valid. The judgment of the arbitrators in the instant case to adjudicate, the

validity of the contract upon which their existence and authority depends is surely *exercise of judicial power.*

In addition, the *dictum* of the Ninth Circuit Court of Appeals in indicating that the constitutional principle barring delegation of judicial power to other than Article III Judges may not apply to delegation of judicial power to arbitrators, is not consistent with the federal statutes relating to arbitration and to be hereinafter discussed.

The Court of Appeals in its *Pacemaker Diagnostic* decision held:

> "The judgment of the magistrate is vacated. Our holding prohibits *magistrates* from entering judgments, a function reserved for Article III officers."

Another recent case citing and following this Supreme Court's decision in the *Northern Pipeline* barring the delegation of judicial power is the July 28, 1983 decision of:

> *Union Carbide Agricultural v. Ruckleshaus, Administrator,* Unreported, Case 76 Civ. 2913 (RO) Southern District of New York (App. A49).

In this case before Judge Owen in the United States District Court for the Southern District of New York, the question arose as to the constitutionality of 7 U.S.C. 136a (c)(1)(D), of the Pest Control Act. This provided for fixing the amount of compensation to submitters of the description of insecticide ingredients disclosed without authority to others, unless the amount was otherwise determined by arbitration. Section 136a(c)(1)(D) of the Act stipulated that:

> "• • • The findings and determination of the arbitrator shall be final and conclusive, and *no* official or *court* of the United States shall have the *power or ju-*

> *risdiction to review* any such findings and determination except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator * * *."

District Judge Owen held:

> "What is dispositive here is the fact that the proposed arbitration procedure commits to arbitrators the power to resolve valuation issues *without judicial review. This absolute assignment of power to arbitrators is an impermissible intrusion on the judiciary.*
>
> * * * * *
>
> "The use compensation system utterly *deprives the federal courts* of any meaningful role in ensuring the provision of fair compensation to data submitters. The courts play no role in fact finding. More importantly, however, they are barred from considering any matters of law arising from the substantive issues in dispute in an arbitration proceeding . . . rather their powers are limited to review for 'fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator'. This leaves the courts with no power to make any 'informed, final determination' of a data submitter's right to compensation. *Such an assignment of powers to arbitrators* cannot be sustained in the face of Article III."

It thus appears from these decisions that the judicial power of the United States cannot be delegated by the judicial or the legislative branch of governments to persons who are not Article III Judges, no matter whether such persons are bankruptcy judges, magistrates or arbitrators.

### 3. The Federal Statutes Relating to Arbitration Cannot Constitutionally Delegate to Arbitrators the Judicial Power to Adjudicate the Validity of the Contract Under Which They Presume to Act.

Although the Court of Appeals for the Seventh Circuit in its decision below did not rely upon the federal statutes relating to arbitration, consideration of these statutes is in order. In 1937 Congress enacted 9 U.S.C. 2 declaring:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, *shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.*" 9 U.S.C. 2 (App. A20).

By this means, *Congress bestowed* on the arbitrators the judicial power to decide all questions to arise in the arbitration proceeding. Inasmuch as the statute declared such contracts to be *valid* there exists no opportunity for an Article III Judge to determine whether the contract is valid. There may be a very slight opening for an Article III Judge to take part in the controversy if there exists "such grounds as exist at law or in equity for the revocation of any contract". This limited opportunity for an Article III Judge to intercede in the controversy does not authorize an Article III Judge to declare the contract revocable because invalid for want of consideration, for lack of definiteness, and for being unconscionable. The Courts below in this case did not, or would not, intercede to de-

clare the contract invalid but left this *judicial function* for the arbitrators to perform.

In 1953 this Supreme Court in the decision of

*Wilko v. Swan*, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168

held a certain *arbitration contract* to be *invalid* as being in conflict with provisions of the Securities Act of 1933. The Court noted the marked limitation in the arbitration statute of the permissible intrusion of the judicial process in arbitration proceedings:

> "In unrestricted submissions, as the present margin agreements envisage, the *interpretation of the law* by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation. The United States Arbitration Act contains *no provision for judicial determination of legal issues* such as is found in the English law."

In 1970, Congress enacted 9 U.S.C. 201 which to a small degree lessened the judicial power of arbitrators which they otherwise possessed in those instances in which there was a *foreign* arbitrable award. This curtailment of the judicial power of arbitrators in the case of arbitration awards made in *foreign* countries, was made in the statute, 9 U.S.C. 201 (App. A20):

> "The convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in the United States Courts *in accordance with* this chapter."

The Convention referred to in the statute, and incorporated therein by reference to the same, reads in pertinent part as follows:

"Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

* * * * *

Article II

* * * * *

"3. The court of a contracting state, when seized of an action in a matter of which the parties have made an agreement within the meaning of this article shall, at the request of one of the parties, refer the parties to arbitration, *unless* it finds that the said *agreement is null and void, inoperative, or incapable of being performed.*"

United States, United Kingdom and West Germany are contracting states under the Convention. In this case, the Petitioners are citizens of the United States, the Respondent is a citizen of West Germany, and the situs of any arbitral award would be in the United Kingdom.

The exercise of judicial power by the arbitrators to adjudicate the validity of the subject contract which was attempted to be bestowed on them by the Court of Appeals below, is curtailed by this statute incorporating the Convention.

In 1974, and at a time following enactment of 9 U.S.C. 201 directed to Foreign Arbitral Awards (incorporating the Convention of the Recognition and Enforcement of Foreign Arbitral Awards), this Court in

*Scherk v. Alberto-Culver*, 417 U.S. 506, 94 S. Ct. 2449, 41 L. Ed. 270

made a distinction as regards the prior decision *Wilko v. Swan*, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168. In the *Wilko v. Swan* case, the opposing parties were both citizens of the United States. However, in *Scherk v. Alberto-*

*Culver, Scherk* was a German citizen and *Alberto-Culver* was a United States corporation. Both cases involved contracts containing provisions which were charged to be in violation of the Securities Exchange Act. Both contracts incorporated arbitration clauses for settlement of any disputes that might arise in both cases. In *Scherk v. Alberto-Culver* the contract provided that the arbitration was to be before the International Chamber of Commerce in Paris, France. A party had invoked the judicial power of the United States to adjudicate the validity and enforceability of the contract containing such illegal provisions.

In *Wilko v. Swan* the court held that notwithstanding the arbitration clause in the contract the courts *could* adjudicate the validity of such a contract. However, in the later case of *Scherk v. Alberto-Culver*, in denying the right of the courts to intercede, the Court emphasized and based its decision on the fact that the opposing parties were citizens of different countries. The maintenance of good international relations was apparently considered paramount. The Court said:

> "* * * The Respondent's reliance on Wilko in this case ignores the significant and, we find, crucial differences between the agreement involved in Wilko and the one signed by the parties here. Alberto-Culver's contract to purchase the business entities belonging to Scherk *was a truly international agreement.*
>
> * * * * *
>
> "For all these reasons we hold that the agreement of the parties in this case to *arbitrate any dispute* arising out of their *international commercial transaction* is to be respected and enforced by the federal courts in accord with the explicit provisions of the Arbitration Act."

The court in *Scherk v. Alberto-Culver*, in a footnote to its opinion, took note of the existence of the Convention and Enforcement of Foreign Arbitral Awards, incorporated in 9 U.S.C. 201, and providing for enforcement in United States courts of arbitration agreements "*unless* it finds the said agreement is *null and void*, inoperative or incapable of being performed." However, it apparently deemed the international agreement before it not of a nature to which the provisions of the Convention were to be applied.

The protection afforded by Article III of the Constitution afforded to a party invoking the judicial power of the United States is not to be measured or granted in accordance with whether or not both parties are citizens of the same country as in *Wilko* or citizens of different countries as in *Scherk*. The constitutional right to have the validity of a contract containing an arbitration adjudicated by an Article III Judge belongs to all citizens who invoke the judicial power of the United States. This constitutional protection is afforded to all citizens whether or not they happen to contract with another United States citizen or with a citizen of another country. The Constitution is not so selective as those citizens who come within its scope of protection.

Another more recent statute enacted in 1982 by Congress on the subject of arbitration is 35 U.S.C. 294 which expressly authorizes arbitration or controversies involving *patent* license contracts. The pertinent portion is section (a) of the statute reading:

> "(a) A contract *involving a patent* or any right under a *patent* may contain a provision requiring arbitration of any dispute relating to patent validity or infringement arising under the contract. In the absence of such a provision, the parties to an existing

patent validity or infringement dispute may agree in writing to settle such dispute by arbitration. Any such provision or agreement shall be *valid, irrevocable, and enforceable, except for any grounds that exist at law or in equity for revocation of a contract.*"

This statute (35 U.S.C. 294) directed specifically to arbitration of contracts involving patents is of the same character as the general statute (9 U.S.C. 2) on arbitration agreements. Insofar as the issue of constitutionality is concerned, both statutes are defective in attempting to delegate judicial power to persons who are not Article III Judges.

## CONCLUSION

Neither the parties themselves, nor the President, nor the Congress, nor the United States Courts can constitutionally delegate the judicial power of the United States to persons who are not Article III Judges, no matter whether such persons are called "bankruptcy judges", "magistrates" or "arbitrators".

The Court of Appeals in its decision below (App. A8) stated that:

"• • • There is a strong policy in favor of carrying out commercial arbitration when a contract contains an arbitration clause. Arbitration lightens courts' workloads, and it usually results in a speedier resolution of controversies."

There is also a strong policy of preserving to citizens who have invoked the judicial power of the United States the constitutional protection of having their controversies, particularly controversies over the validity of contracts between them, adjudged by persons who are Article III Judges under the Constitution.

Although there is also a strong policy favoring settlement of controversies by means of arbitration, there should also be a policy of *not discouraging arbitration by the fear and apprehension* that if one signs an agreement containing an arbitration clause that one surrenders and loses the constitutional protection of having the validity of the contract decided by an Article III Judge.

In this balance of advantages, rights, and alternative procedures, the rights preserved by the Constitution should be held paramount and controlling.

## PRAYER

The Petitioners ask that by grant of a Writ of Certiorari the decision below of the Seventh Circuit Court of Appeals be reviewed and that the decision be vacated as contrary to the Constitution, and that the case be remanded to the District Court for a new trial with directions to adjudicate the validity of the subject contract under the law of Indiana, and to enjoin arbitration until the validity of the contract is established.

The intervention of this Court is warranted by the grant of the sought for Writ of Certiorari.

Respectfully submitted,

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# APPENDIX

## DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Decided August 22, 1983)

Nos. 82-1662 and 82-1726

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

---

SAUER-GETRIEBE KG,
*Plaintiff-Appellee, Cross-Appellant,*

*v.*

WHITE HYDRAULICS, INC., HARVEY C. WHITE and HOLLIS N. WHITE, JR.,
*Defendants-Appellants, Cross-Appellees.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA,
LAFAYETTE DIVISION
NO. 81 C 56—ALLEN SHARP, JUDGE

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Before CUMMINGS, *Chief Judge*, BAUER and COFFEY, *Circuit Judge*.

CUMMINGS, *Chief Judge*. We consider in this appeal whether an agreement in an international, commercial contract to arbitrate "any and all" contractual disputes governs disputes regarding whether the contract is invalid for lack of consideration, unconscionability, and vagueness and whether one party waives its right to arbitration by filing suit to enjoin the other party from breaching that contract pending arbitration.

**[2]** On June 29, 1979, defendant White Hydraulics, Inc. ("White"), an Indiana corporation, contracted to give Sauer-Getriebe KG ("Sauer"), a West German limited partnership, the exclusive right in a territory encompassing some 47 countries, including East and West Germany but excluding the United States, to sell motors manufactured by White. White also agreed to convey to Sauer upon the occurrence of certain events the trade secrets, patent rights, and any other rights necessary for the manufacture of those motors and to furnish Sauer all the technical "know-how" about the motors necessary for Sauer to market them. In exchange, Sauer agreed to pay a certain royalty on each motor sold and stated that its "intent" was to purchase 50,000 motors from White during the years 1979 through 1985. Both parties agreed that "[a]ny and all disputes arising out of and in connection with" the contract would be settled by arbitration.

In August 1981, Sauer commenced this diversity action. It alleged that on July 21, 1981, White had repudiated the contract by informing Sauer that it was negotiating for the sale of its assets, including the manufacturing rights promised Sauer under the contract, to a third party. In its complaint, Sauer represented that it intended to exercise its right to arbitrate the contract dispute and sought preliminary and permanent injunctions barring White from transferring any manufacturing rights "until such time as the respective rights of the parties under the agreement are determined" by arbitration.

In its answer, White admitted having executed the alleged contract and having informed Sauer of the third-party negotiations. White claimed, however, that Sauer had waived its right to arbitrate by filing suit. White also counterclaimed for a declaratory judgment that the contract was unenforceable for vagueness and want of consideration, that its terms were unconscionable and in-

equitable, and that the contract was illegal under Section 1 of the Sherman Act (15 U.S.C. § 1). Sauer thereafter filed a supplemental complaint in which it claimed that on August 31, 1983, it had requested White to transfer to [3] it all manufacturing rights in the motors. Sauer further alleged that as of that date all of the events prerequisite to that transfer had occurred, but that White had refused to comply with its request.

The parties agreed to a bench trial. At the conclusion, Judge Sharp denied Sauer injunctive relief on the grounds that White had not repudiated the contract and that Sauer was not entitled to the manufacturing rights. Judge Sharp also enjoined Sauer from pursuing the arbitration proceeding it had begun on the ground that its request for arbitration before the International Commerce Commission ("ICC") had been filed in the wrong city—Paris, instead of London. Judge Sharp granted Sauer leave to refile its request in London but held that his findings would be binding in any subsequent arbitration proceeding. Finally, although Judge Sharp found the contract "vague and ambiguous" in certain respects, he dismissed White's counterclaim because he found "insufficient evidence to establish the invalidity of the contract." White has appealed and Sauer has cross-appealed. For the reasons that follow, we affirm the dismissal of White's counterclaim but vacate the remainder of the judgment and direct the district court to enjoin White from repudiating the contract and from transferring any of Sauer's contractual rights to a third party until the arbitration requested by Sauer is completed and this lawsuit (including any appeals) is terminated.

*Arbitration Waiver*

White makes two attacks on Sauer's right to arbitrate this dispute. First, White claims that before this dispute

may be submitted to arbitration, a court must decide that the contract containing the arbitration clause is valid and enforceable. White argues that if there is no contract to buy and sell motors there is no agreement to arbitrate. The conclusion does not follow its premise. The agreement to arbitrate and the agreement to buy and sell motors are separate. Sauer's promise to arbitrate was given in exchange for White's promise to arbitrate and each promise [4] was sufficient consideration for the other. See *Hellenic Lines, Ltd. v. Louis Dreyfus Corp.*, 372 F.2d 753, 758 (2d Cir. 1967). Moreover, there is nothing that requires that courts rather than arbitrators decide the validity of contracts, see, *e.g., In Re Oil Spill By The "Amoco Cadiz,"* 659 F.2d 789, 794-795 (7th Cir. 1981) (fraud in the inducement), nor is there anything to suggest that when Sauer and White executed their contract they intended to limit in any way the kinds of disputes to be settled by arbitration. The language of the arbitration clause in the contract could not be broader. It expressly provides that

> Any and all disputes arising out of and in connection with this Agreement shall be finally settled by arbitration under the rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the Rules. The arbitration shall take place in London, United Kingdom of Great Britain.

This provision covers Sauer's claim that White repudiated the contract as well as White's claim that the contract is invalid. It is too late for White to argue that arbitrators appointed under ICC rules lack the competence to adjudicate the validity of its contract. Had White thought so when it entered the contract, it would not have agreed to arbitrate "any and all claims" before them.

Second, White argues that by filing this lawsuit, Sauer waived its right to arbitrate. We disagree. Sauer's right to seek injunctive relief in court and its right to arbitrate are not incompatible—Sauer need not have abandoned one to pursue the other—and White cannot in good faith claim that it was misled by Sauer's filing this suit into believing that Sauer intended to forego arbitration. See *Erving v. Virginia Squires Basketball Club,* 468 F.2d 1064 (2d Cir. 1972). Sauer alleged in its complaint that it intended to submit a request for arbitration of its claims and Article 8, Section 5 of the internal rules of the ICC court of arbitration expressly authorizes parties to seek the interim relief Sauer sought in its complaint:

> **[5]** Before the file is transmitted to the arbitrator, and in exceptional circumstances even thereafter, the parties shall be at liberty to apply to any competent judicial authority for interim or conservatory measures, and they shall not by so doing be held to infringe the agreement to arbitrate or to affect the relevant powers reserved to the arbitrator.

Sauer waited four more months before filing an arbitration request with the ICC but, in part at least, the delay was due to White's slowness in responding to Sauer's request for transfer of the manufacturing rights and at any rate, Sauer took no action during those four months inconsistent with its original position. It pleaded its arbitration right in defense to White's counterclaim and it reasserted that right in its supplemental complaint.[1]

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1. White relies on *Galion Iron Works v. J.D. Adams Mfg. Co.,* 128 F.2d 411 (1942), and *United States v. Bregman Construction Co.,* 256 F.2d 851 (1958), both from this Circuit, to support its claim that arbitration was waived by Sauer's filing this lawsuit. Both cases are inapplicable because Sauer did not invoke the litigation machinery inconsistently with its right to arbitration, and because Sauer's brief delay before formally requesting arbitration was not undue and did not prejudice White. Indeed a settlement might have been achieved during that interval.

Judge Sharp did not find that Sauer had waived its right to arbitration. Nonetheless he enjoined Sauer from pursuing the arbitration request it had filed with the ICC in Paris on the ground that the contract required that the request be filed in London. The contract, however, requires that the arbitration "take place in London," not that the request for arbitration be filed there. The contract also provides that the arbitration shall be conducted in accordance with ICC rules. Article 3, paragraph 1 and Article 1, paragraph 5 of those rules in effect require that requests for arbitration be filed in Paris with the Secretariat of the ICC Court of Arbitration. It does not follow **[6]** that because Sauer filed its request in Paris the arbitration will take place there. Sauer did not request that it take place there—in fact the arbitrator Sauer selected lives in London—and Article 12 of the ICC arbitration rules provides that "the place of arbitration shall be fixed by the Court [of Arbitration], *unless agreed upon by the parties.*" (emphasis supplied). There is therefore no reason to suppose that because Sauer filed its arbitration request as required by ICC rules, the arbitration will not be held in the place specified in the contract. Sauer is therefore not required to refile its request in London. Finally, because the arbitration request was filed properly, we also reverse Judge Sharp's order directing Sauer to nominate a new arbitrator.

*District Court Findings Regarding The Validity of the Contract*

Although the district court found "insufficient evidence to establish the invalidity of the contract * * *," the court did find the contract "vague and ambiguous * * * [and] not certain nor reasonably ascertainable." The court also found that the contract should be strongly and strictly construed against Sauer and most favorably for White

and that the arbitrators must therefore construe any uncertain, ambiguous, and vague terms against Sauer and in favor of White. Since the parties agreed to arbitrate all disputes arising from the contract, these findings are not binding and should be disregarded by the arbitrators in any subsequent arbitration proceeding. See 9 U.S.C. § 3; *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519; *McElwee-Courbis Construction Co., Inc. v. Rife*, 133 F. Supp. 790 (M.D. Pa. 1955).

*Injunction Against White's Selling Trade Secrets and Manufacturing Rights*

The district court refused to grant Sauer's request to enjoin White's sale of its manufacturing contractual rights pending resolution of the arbitration. Since Sauer seeks only an injunction pending arbitration, we will consider whether the four factors justifying a preliminary injunction [7] are present. *Wesley-Jessen Division v. Bausch & Lomb, Inc.*, 698 F.2d 862, 867 (7th Cir. 1983).

Sauer has shown that it has made a substantial investment in White's hydraulic motors and that it cannot obtain the necessary trade secrets and manufacturing rights from others. Sauer has also shown that without equitable relief, there would be a substantial injury to its reputation, good will and prestige not compensable in damages. Thus it has adequately demonstrated irreparable harm.

White might suffer some hardship if it is enjoined from transferring its manufacturing rights but, by the same token, Sauer's right to arbitration will not be worth much if White transfers those rights before arbitration is settled. Moreover, Sauer is willing to supply a security bond to guarantee White's financial recovery should it be forced to sell its business at a lower price after the injunction

is lifted (Sauer Br. 22). That would protect White against any financial loss, so that the balance of hardship is in Sauer's favor.

Although it is improper for a court to decide a contractual dispute relegated to arbitration, so far as the issuance of an injunction is concerned Sauer has demonstrated enough probable success on the merits to warrant relief. Sauer will be entitled to specific performance if it convinces the arbitrators that the contract entitles it to the trade secrets and manufacturing rights claimed. The contractual events prerequisite to the transfer of those rights have ostensibly occurred—Sauer has ordered over 15,000 motors, 18 months expired from the signing of the contract and the placing of those orders, and as of August 31, 1981 the Deutschmark—U.S. dollar ratio had been above 2.20 for four months. White bases its case solely on the alleged invalidity of a contract it freely signed three years ago even though it performed under the contract during those three years. Despite Judge Sharp's March 12, 1982, finding that the contract is valid on its face and his March 31 decision that Sauer failed to establish its invalidity (White App. 52 57), White is now [8] endeavoring to repudiate that agreement on four separate grounds (White App. 37-39). In these circumstances, Sauer has sufficiently shown likely success.

Finally, the public interest is served by granting this injunctive relief because there is a strong policy in favor of carrying out commercial arbitration when a contract contains an arbitration clause. Arbitration lightens courts' workloads, and it usually results in a speedier resolution of controversies. Since Sauer has satisfied the requisites for obtaining injunctive relief of this type, the district court's refusal to grant it was erroneous.

Judgment affirmed with respect to dismissal of White's counterclaim. Remainder of judgment vacated and cause remanded with directions to enjoin White from repudiating the June 29, 1979, contract and from transferring any of Sauer's claimed contractual rights to a third party until the London arbitration requested by Sauer on December 18, 1981, is completed and this lawsuit (including any appeals) is terminated Sauer to file security bond in district court in the sum of $100,000. Costs on appeal to be borne by White.

# DECISION OF THE UNITED STATES DISTRICT COURT

(Dated March 31, 1982)

No. L 81-56

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

SAUER-GETRIEBE KG,
*Plaintiff,*

vs.

WHITE HYDRAULICS, INC., HARVEY C. WHITE and HOLLIS N. WHITE, JR.,
*Defendants.*

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### *FINDINGS OF FACT*

1. This action was tried before the Court without a jury on March 11 and 12, 1982.

2. This is an action brought by Sauer-Getriebe KG, a partnership organized under the laws of the Federal Republic of West Germany, (hereinafter referred to as SAUER) against White Hydraulics, Inc., Harvey C. White and Hollis N. White, Jr. (hereinafter collectively referred to as WHITE). White Hydraulics, Inc., is a corporation organized under the laws of the State of Indiana and Harvey C. White and Hollis N. White, Jr.

3. This Court has jurisdiction of the subject matter of this action and of the parties to this action.

4. SAUER and WHITE entered into a written contract on June 29, 1979, which contract dealt with the sale of certain hydraulic motors to SAUER by WHITE to be sold in a certain territory and the transfer under certain conditions of certain manufacturing rights to enable SAUER to manufacture the subject hydraulic motors. The specific hydraulic motors subject of the said contract and of this civil action are particularly identified in the contract. A copy of the contract of June 29, 1979 is attached to the original verified complaint as "Exhibit A" and made a part therof.

[2] 5. The original verified complaint filed August 14, 1981 charged WHITE with repudiation of the contract because they had advised SAUER in about July 1981 that they were negotiating with a third party for the sale of White Hydraulics, Inc. There is no evidence that defendants have repudiated the contract of June 29, 1979, subject of this action.

6. In a supplemental complaint (motion for leave to file same filed November 17, 1981), SAUER charged that on August 31, 1981 it had asked WHITE for the manufacturing rights referred to in the contract and WHITE refused, and continues to refuse the request. SAUER requested that WHITE be enjoined from transferring the manufacturing rights to a third party pending arbitration of the contract dispute described in the supplemental complaint.

7. By affirmative defense and counterclaim, the defendants have questioned the validity of the contract of June 29, 1979. However, the Court does not find in the evidence sufficient grounds for holding the contract to be invalid. Neither does the Court find any evidence whatsoever to support any claim that this contract violates the Sherman Act, 15 U.S.C., Section 1.

8. The contract was negotiated between the parties during the period of about January 1979 to June 29, 1979 by means of a number of personal visits by principals of SAUER, namely Klaus Murmann, Wolfgang Weisser and Juergen Helwig, to principals of WHITE, namely Harvey C. White and Hollis N. White, Jr., in Lafayette, Indiana and Chicago, Illinois. The original draft of a contract was prepared by SAUER's attorney in the Federal Republic of West Germany and was then sent to WHITE for review, modifications and signature.

9. The final draft of the contract of June 29, 1979 was signed on behalf of SAUER by Messrs. Murmann and Gorig in the Federal Republic of West Germany and by Messrs. Harvey and Hollis White in Lafayette, Indiana on behalf of White Hydraulics, Inc.

[3] 10. SAUER has ordered, and WHITE has manufactured and sold to SAUER since June 29, 1979, subject motors subject of the contract on a relatively irregular order schedule with the total motors ordered and sold being about 3600 as of the end of December 1981.

11. In May 1981 the currency exchange between the German Mark and the United States Dollar exceeded the ratio of 2.20 to 1 and to date has at all times exceeded this ration.

12. In about January of 1981 negotiations were instituted between the parties for the purchase by SAUER of all of the assets and/or stock of WHITE. These negotiations continued through June of 1981 and were unsuccessfully concluded in July of 1981.

13. In July of 1981 WHITE advised SAUER of negotiations by WHITE with a third party for the sale of the stock of White Hydraulics, Inc.

14. SAUER filed on December 18, 1981 a request for arbitration of the June 29, 1979 contract with the International Chamber of Commerce, 38 Cours Albert ler, 75008 Paris, France, allegedly under the provisions of Article VIII, paragraph F of the contract. In any event, the request for arbitration is ineffective because the June 29, 1979 contract states that the "arbitration *shall* take place in London, United Kingdom of Great Britain". There is no mention of arbitration in Paris, France.

15. The June 29, 1979 contract is vague and ambiguous in several respects including:

(a) The total number of motors relative to the stated total of 50,000 to be purchased by SAUER when considering that the exclusable provisions of Article II, paragraphs C-1 and C-2 is not certain nor reasonably ascertainable nor is the point in time within the term of the contract when this can be determined;

[4] (b) The term during which SAUER shall be obligated to buy or be forgiven from buying subject to Motors from WHITE, after an unfavorable rate of currency exchange has occurred as provided in Article II, paragraph C-1, is not certain nor reasonably ascertainable;

(c) The term during which SAUER may exercise "its manufacturing rights" under the provisions of Article III, paragraph B, is not certain nor reasonably ascertainable;

(d) The time in which WHITE is bound to make trade secrets available to SAUER is not certain nor reasonably ascertainable under the provisions of Article III, paragraph B-2; and

(e) The identity, nature and scope of the trade secrets to be made available to SAUER under the provisions

of Article III, paragraphs B-2(a), (b) and (c) are not certain nor reasonably ascertainable.

16. The June 29, 1979 contract was prepared in Germany by plaintiff's German lawyer in the German language and then translated into English before being mailed to defendants in Lafayette, Indiana for their signatures there.

Under controlling law, a contract so drafted by one party is to be construed and interpreted most strongly and strictly against the party so drafting the contract and most favorably for the other party. Therefore, in any proceeding concerning the performance of the contract by the parties, including any arbitration proceedings that may take place, the uncertainties, ambiguities, and vague terms in the contract of June 29, 1979 must be construed and interpreted most strongly in favor of defendants and most strongly against the plaintiff.

17. The filing by plaintiff of a request for arbitration with the International Chamber of Commerce in Paris, France, was not in accordance with the arbitration clause in the contract of June 29, 1979, which expressly provides that arbitration shall take place in London, United Kingdom of Great Britain. [5] Plaintiff is enjoined from proceeding with the arbitration proceeding filed in Paris, France. If plaintiff wishes in the future to proceed with arbitration under the contract of June 29, 1979, it shall start all over again by filing a new request for arbitration in London, United Kingdom of Great Britain, and shall then nominate a new arbitrator to replace the arbitrator previously named by plaintiff. This decision shall govern in any such arbitration as shall occur.

*CONCLUSIONS OF LAW*

1. The Court has jurisdiction of the subject matter of this action and over the parties.

2. Defendants have not repudiated the contract of June 29, 1979, subject of this action.

3. Since WHITE has not repudiated said contract, the relief requested in the original verified complaint is DENIED and the verified complaint is DISMISSED.

4. Inasmuch as WHITE has not repudiated the contract and inasmuch as SAUER is not entitled at this time to the said manufacturing rights, the relief requested in the supplemental complaint is DENIED and the supplemental complaint is DISMISSED.

5. There is insufficient evidence to establish the invalidity of the contract as asserted by defendants and the defendants' counterclaim is DISMISSED.

6. The contract of June 29, 1979, subject of this action, has not been repudiated by WHITE. The original verified complaint and the supplemental complaint, being without merit, should be dismissed, and areby DISMISSED, with prejudice.

7. The complaint and counterclaim are DISMISSED, with prejudice.

8. Each party is to pay its own costs.

Enter March 31, 1982.

/s/ ALLEN SHARP

*Chief Judge, United States District Court*

# JUDGMENT ENTRY OF THE UNITED STATES DISTRICT COURT

(Dated March 31, 1982)

Civil Action File No. L 81-56

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

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SAUER-GETRIEBE KG,

vs.

WHITE HYDRAULICS, INC., HARVEY C. WHITE and HOLLIS N. WHITE, JR.,

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## JUDGMENT

This action came on for trial before the Court, Honorable Allen Sharp, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered (1) The Court has jurisdiction of the subject matter of this action and over the parties. (2) Defendants have not repudiated the contract of June 29, 1979, subject of this action. (3) Since WHITE has not repudiated said contract, the relief requested in the original verified complaint is DENIED and the verified complaint is DISMISSED. (4) Inasmuch as WHITE has not repudiated the contract and inasmuch as SAUER is not entitled at this time to the said manufacturing rights, the relief requested in the supplemental complaint is DENIED and the supplemental complaint is DISMISSED. (5) There

is insufficient evidence to establish the invalidity of the contract as asserted by defendants and the defendants' counterclaim is DISMISSED. (6) The contract of June 29, 1979, subject to this action, has not been repudiated by WHITE. The original verified complaint and the supplemental complaint, being without merit, should be dismissed, and areby DISMISSED, with prejudice. (7) The complaint and counterclaim are DISMISSED, with prejudice. (8) Each party is to pay its own costs.

## JUDGMENT ENTRY OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Dated August 22, 1983)

Nos. 82-1662
82-1726

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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Before
Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
HON. JOHN L. COFFEY, *Circuit Judge*

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SAUER GETRIEBE KG,
*Plaintiff-Appellee,*
*Cross-Appellant,*

vs.

WHITE HYDRAULICS, INC., HARVEY C. WHITE and HOLLIS N. WHITE, JR.,
*Defendants-Appellants,*
*Cross-Appellees.*

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Appeals from the United States District Court for the Northern District of Indiana,
Lafayette Division.

No. 81 C 56

Judge Allen Sharp

This cause was heard on the record from the United States District Court for the Northern District of Indiana, Lafayette Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED in part, VACATED AND REMANDED in part, with directions, with costs on appeal to be borne by White, in accordance with the opinion of this Court filed this date.

# UNITED STATES STATUTES PERTINENT TO SUBJECT OF ARBITRATION

## 9 U.S.C. 2

**Validity, irrevocability, and enforcement of agreements to arbitrate**

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

July 30, 1947, c. 392, 61 Stat. 670.

## 9 U.S.C. 201

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

Added Pub.L. 91-368, § 1, July 31, 1970, 84 Stat. 692.

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

### Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral

awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under Article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

## Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

## Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

## 35 U.S.C. 294 (a)

**Act of August 27, 1982, 96 Stat. 322**

(a) A contract involving a patent or any right under a patent may contain a provision requiring arbitration of any dispute relating to patent validity or infringement arising under the contract. In the absence of such a provision, the parties to an existing patent validity or infringement dispute may agree in writing to settle such dispute by arbitration. Any such provision or agreement shall be valid, irrevocable, and enforceable, except for any grounds that exist at law or in equity for revocation of a contract.

## AGREEMENT OF JUNE 29, 1979

AGREEMENT

THIS AGREEMENT made and entered into as of the 29 day of June, 1979, by and between WHITE HYDRAULICS, INC., an Indiana, U.S.A., Corporation, having its place of business at Lafayette, Indiana, U.S.A. (hereinafter called "WHITE"); and SAUER GETRIEBE KG (hereinafter called "SAUER"), a German Limited Partnership, having its place of business in Neumuenster, West Germany,

WITNESSETH:

WHEREAS, WHITE is the developer and owner of technical information, drawings, data, know-how, confidential business information, and manufacturing techniques, (all hereinafter referred to as "Trade Secrets") relating to Hydraulic Gerotor Motors and/or Pumps described further as hydraulic motors and/or pumps comprising an output shaft with output shaft speed commutation, an orbiting externally tooth rotor located in an internally toothed stator having one extra tooth and an intermediate shaft connecting rotor and output shaft for joint rotation, further described in WHITE's catalog No .7-78, pages 4 and 5, and in WHITE's reference drawing No. RS 504, (hereinafter called "Motor(s)"); and

WHEREAS, WHITE is the owner of the exclusive rights in an invention covered by United States Patent Application Serial No. 903,589 and any United States Patent issuing upon said application and any patents issuing in countries foreign to the United States and corresponding to said United States Patents issuing upon said application Serial No. 903,589 (referred to hereinafter as Patent Rights):

WHEREAS, WHITE is possessed of the right and authority to enter into this Agreement;

WHEREAS, SAUER is active in the manufacture and distribution of Hydraulic Pumps and Motors; and

[2] WHEREAS, SAUER is desirous to purchase Motors developed and manufactured by WHITE and to distribute and to reproduce those Motors manufactured and developed by WHITE; and

WHEREAS, WHITE is desirous to sell Motors to SAUER and to grant SAUER sales and manufacturing rights;

WHEREAS, SAUER is desirous of acquiring said Trade Secrets to enable it to manufacture and sell said Motors;

WHEREAS, SAUER is desirous of obtaining rights under said Patent Rights in certain countries foreign to the United States.

NOW, THEREFORE, in consideration of the premises and agreements contained herein, the parties hereto agree as follows:

## ARTICLE I

### *SALES TERRITORY AND EXCLUSIVITY*

SAUER shall have the exclusive right to sell the subject Motors whether purchased from WHITE as manufacturer, or assembled or manufactured by SAUER, or by a vendor manufacturer designated in writing by SAUER, pursuant to a royalty agreement hereinafter set out, and also subject to the conditions and restrictions of this Agreement, to customers only in the countries listed in "Schedule A", ("Exclusive Territory"), which is attached hereto and by reference made a part hereof. During the term and

continuance of this Agreement, WHITE agrees not to grant relating said Trade Secrets or said Patent Rights concerning said Motors to third parties in the territory listed in "Schedule A". During the term and continuance of this Agreement, WHITE furthermore agrees not to deliver subject Motors into SAUER's exclusive territory either directly or indirectly.

[3] ARTICLE II

*TERMS AND CONDITIONS OF DISTRIBUTOR AGREEMENT*

A. SAUER hereby states it is their intent to purchase fifty thousand (50,000) Motors from WHITE to be delivered during the years 1979 through 1985, contingent upon the terms and conditions as set out in this Agreement. WHITE hereby states it is their intent contingent upon the terms and conditions as set out in this Agreement, to manufacture and sell the said fifty thousand (50,000) Motors to SAUER to be delivered during the years 1979 through 1985.

B. Upon the execution of this Agreement WHITE agrees to furnish SAUER with all reference prints, sales aids and other application engineering and technical know-how necessary to market the motors.

C. It is hereby agreed and understood by and between the parties that this Agreement shall be subject to the following conditions:

1. SAUER shall be excused from further purchase of Motors under this Agreement if, and so long as, the currency exchange between the German Mark and the American Dollar exceeds an average rate of 2.20 : 1 for a period of four (4) consecutive months. In such case the agreed number of fifty thousand (50,000)

Motors will be reduced according to the time at which SAUER will not buy from WHITE in proportional relation to the time from when the Agreement is in effect until 1985.

2. SAUER shall be excused from further purchase of Motors under this Agreement if customs duties applicable to goods entering Germany are raised, and so long as the said duties are maintained at a rate of, more than thirty (30%) percent over the rate in effect on the date of execution of this Agreement. In such [4] case the agreed number of fifty thousand (50,000) Motors will be reduced according to the time at which SAUER will not buy from WHITE in proportional relation to the time from when the Agreement is in effect until 1985.

3. WHITE agrees the current prices of the Motors when sold to SAUER shall not exceed the prices as then prices being currently quoted by WHITE to United States customers for the like kind and quantity.

4. SAUER shall be excused from executing the intended purchasing agreements if, and so long as, the prices quoted by WHITE to the United States customers and SAUER are not competitive on the United States market. In such case the agreed number of fifty thousand (50,000) Motors will be reduced according to the time at which SAUER will not buy from WHITE in proportional relation to the time from when the Agreement is in effect until 1985.

5. WHITE agrees that the quality of the Motors delivered to SAUER shall comply with Engineering Specification 100. Copy of said specifications are set out in Schedule "C" which is attached hereto and by reference made a part hereof.

6. SAUER agrees that its specific purchase orders for shipment will be in accordance with a twelve (12) months forecast by SAUER. This forecast will be consistent with, and proportionate to, the intended purchase of fifty thousand (50,000) Motors from 1979 through 1985. If the forecast for twelve (12) months exceeds this proportionate number, the forecast has to be agreed upon by WHITE. SAUER will update the forecast every six (6) months.

**[5]** 7. If WHITE fails to make shipments of Motors in accordance with SAUER's purchase orders based on the current twelve (12) months forecast, and such failure continues for a period of three (3) consecutive months, or should aforesaid conditions 1 or 2 of the Article occur, or should WHITE breach conditions 3, 4, or 5 of this Article, then SAUER may exercise its hereinafter defined rights to manufacture the said component parts and assemble the Motors subject to the terms of Article III of this Agreement. In this case of manufacture for or by SAUER, then SAUER shall pay a royalty fee to WHITE for those rights. It is further agreed, that the royalty will not be based on the completed Motor, but will be based only on the manufacture of key component parts, namely the output shaft and the rotor set. SAUER agrees to pay to WHITE a royalty on each output shaft and on each rotor set manufactured either by SAUER or by a designated vendor-manufacturer as designated by SAUER. The royalty percentages shall be ten (10%) percent during the years through 1984, six (6%) percent during the years 1985, 1986 and 1987, and four (4%) percent for the years 1988, 1989 and 1990. No royalty to be charged after 1990. In order to have an agreed standard on which to base the royalty payments, it is agreed that the royalty

percentage rates as listed for the manufacture of the output shaft and rotor set shall be based on SAUER's manufacturing cost or on the purchase price from third sources. SAUER's manufacturing cost shall be computed in accordance with proper accounting practices, and shall include materials, labor, and proper share of overhead, supervision and engineering. If the third sources are independent from SAUER, the purchase [6] price as basis for royalty payments may not be questioned by WHITE. If WHITE, however, questions the total manufacturing cost of SAUER for such parts, WHITE has the right to inspect and approve all elements of the calculation of the total manufacturing cost. If WHITE and SAUER cannot agree on the total manufacturing cost, then SAUER has to present to WHITE good faith quotations of mutually agreeable third party qualified independent manufacturing companies as possible vendors of these components. In such cases the quoted price for third parties will be the basis for the royalty calculation.

Royalty payments shall be made bi-yearly and shall be accompanied by a written report to WHITE showing the basis on which the royalties were computed and giving such information as may be necessary or requested by WHITE to establish the accuracy of the reports. WHITE shall have the right to inspect or cause to be inspected the books and records of SAUER for the purpose of verifying the reports required herein. Payment shall be made in the United States currency or its then equivalent by a draft or check drawn on a solvent New York bank or such other bank as may then be mutually agreed upon, to WHITE or its designee at WHITE's direction. (In case SAUER purchases rotor sets and output shafts

from WHITE, royalties will be included in sales prices to SAUER.)

D. WHITE agrees to supply SAUER with the necessary replacement parts needed to service and repair the Motors which are being sold to SAUER under this Agreement.

[7] ARTICLE III

TERMS AND CONDITIONS OF SAUER'S MANUFACTURING RIGHTS

A. The "Manufacturing rights" subject of the Agreement shall be the rights under WHITE's said Patent Rights and Trade Secrets to manufacture said Motors only in said exclusive territory and to sell said Motors in said exclusive territory.

B. SAUER may exercise its manufacturing rights under this Agreement only after 18 months and before non-cancellable purchase orders for fifteen thousand (15,000) Motors have been given WHITE, then only for the reasons set forth in Article II, C-1, 2, 3, 5, and 7. Regular manufacturing may start 18 months prior to completion of the fifty thousand (50,000) Motor order.

1. If SAUER exercises manufacturing rights, SAUER agrees to pay royalty payments in accordance with the royalty schedule set out in Article II, C-7, of this Agreement:

2. WHITE will make available to SAUER all Trade Secrets relating to any particular model or models of the Motors required by SAUER. WHITE agrees to supply SAUER with one copy each of the following available Trade Secret information by WHITE in the manufacturing, assembly and testing

in the United States of the Motors after 18 months and after SAUER has issued purchase order for fifteen thousand (15,000) Motors scheduled for deliveries within a period of three years after the Agreement has been in effect.

(a) WHITE will make available to SAUER engineering information consisting of available detail and assembly drawings, material specifications, test specifications, parts lists and assembly specifications and data.

[8] (b) WHITE will make available to SAUER manufacturing information consisting of available manufacturing drawings, manufacturing instructions, and designs or other data relative to special manufacturing tools, dies, fixtures, patterns and gauges for such parts, as the case may be.

(c) WHITE will make available to SAUER inspection information consisting of inspection specifications and instructions and designs of special inspection gauges and fixtures.

C. WHITE also agrees to inform SAUER promptly of any changes, improvements and modifications made in the Motors by WHITE during the term of this Agreement and which are embodied in WHITE's United States commercial production of the Motors.

D. WHITE agrees to and shall, when requested by SAUER from time to time during the continuance of this Agreement, furnish SAUER, upon reasonable notice with the services of a competent and experienced technical representative from WHITE as selected by WHITE to assist SAUER in connection with the manufacturer, assembly, inspection, testing and services of the Motors, SAUER shall pay WHITE for such representative's reasonable living ex-

penses necessary travel expenses and in addition to these expenses, a compensation of two hundred Dollars ($200.00) for every man and day. The compensation for Hollis White will be negotiated when his presence is requested.

E. SAUER may at its own expense, by arranging therefore in advance, send representatives employed by SAUER to the plant or plants of WHITE to observe and study the methods employed by WHITE in the manufacture, assembly, inspection, testing and service of the Motors.

[9] F. SAUER agrees to inform WHITE promptly of any changes or improvements in the motors, including any inventions, made by SAUER's employees by drawings, written descriptions or other data and WHITE shall have the non-exclusive right to use such improvements, modifications or inventions in the manufacture and sale of the Motors.

G. SAUER hereby agrees that it will hold in confidence and that it will require its employees and manufacturing sources to whom discussed, the Trade Secrets concerning the Motors obtained from WHITE which is not publicly known or available to others for the duration of this Agreement and hereafter for a period of three (3) years, for the exclusive use and benefit of SAUER or its subcontractors, agreeing to the same condition of confidence, and only for the manufacture and sale of subject Motors. Subject to the identical terms and conditions WHITE agrees to keep confidential all Trade Secrets obtained from SAUER according to Article III, F herein.

H. The parties declare their intention to manufacture identical Motors and to keep the parts of the Motor interchangeable except for the following:

1. 25 mm shaft instead of 1 inch with 7 mm straight key.

2. BPT straight thread ports instead of 1/2 inch pipe threads.

## ARTICLE IV

## TERMS AND CONDITIONS OF SAUER SUB-ASSEMBLY RIGHTS

WHITE agrees to ship parts of the Motors to SAUER in addition to the complete Motors eighteen (18) months prior to the completion of the sale of fifty thousand (50,000) Motors.

SAUER agrees to ship parts to WHITE after SAUER commences the manufacture of such parts, as ordered by WHITE.

**[10]** Both parties will calculate the parts prices in a similar manner and will use the same markup of their total manufacturing cost.

Both parties will keep each other advised concerning pricing by vendors and will combine their purchases if that is desirable.

## ARTICLE V

## HYDROSTATIC STEERING DEVELOPMENT

WHITE and SAUER hereby acknowledge a mutual agreement to pursue further discussions concerning the development and manufacture of Hydrostatic Steering units upon the execution of this Agreement.

## ARTICLE VI

## TERMS AND TERMINATION

A. This Agreement shall commence on the date hereof and end on December 31st, 1990.

B. Either WHITE or SAUER shall be entitled to and may at their option, terminate this Agreement by written notice:

1. If the other party becomes insolvent or if a court order shall be made or a resolution passed for winding up of its affairs.

2. If any of the conditions of the Agreement shall be breached by the other party and such breach shall continue for a period of sixty (60) days from and after written notice is given to the party guilty of such breach.

3. If this Agreement is terminated prior to December 31, 1990 for any reason including those set forth in Article VI, B-1 and B-2, then all rights in said Trade Secrets and said Patent Rights shall revert to WHITE. Under the termination circumstances of this paragraph SAUER agrees to refrain from further use of said Trade Secrets and to return all Trade Secrets and copies thereof to WHITE.

[11] 4. If WHITE breaches the Agreement such that it will sell Motors into SAUER's exclusive territory or sells sales and production rights to a third party in SAUER's exclusive territory or refuses to supply SAUER with the Trade Secrets and Manufacting Documentation as agreed in the contract and for these reasons SAUER will terminate the Agreement, then SAUER has the right to sell and/or manufacture the Motors.

## ARTICLE VII

## *TERMS OF PAYMENT*

Terms of payment on materials and Motors ordered are: Not later than fifteen (15) days after arrival of the merchandise in Neumunster.

## ARTICLE VIII

### *ADDITIONAL PROVISIONS*

A. It it understood that this Agreement shall not be deemed to require any performance on the part of WHITE or SAUER which cannot lawfully be done pursuant to the laws, rules and regulations as now or hereafter in effect, of the governments of the State of Indiana, the United States of America and the Federal Republic of Germany.

B. In the event it should be required to change or amend any provisions herein contained which are held to be invalid or unenforceable, the parties agree to negotiate reasonable terms for such required change or amendment. Both parties mutually waive any damages or restitution claims which may arise out of a holding that this Agreement or any part thereof is invalid or unenforecable.

C. Any notices to be given by the parties under this Agreement shall be made by mailing the same by prepaid air [12] mail to the addresses shown below:

WHITE HYDAULICS, INC.
Post Office Box 2306
West Lafayette, Indiana 47906
United States of America

SAUER GETRIEBE KG
Krokamp 35
2350 Neumuenster
Federal Republic of Germany

Any notices so given shall be deemed to be effective only when it is received by the addressee.

D. This Agrement sets forth the entire agreement and understanding between the parties as to the subject

matter of this Agreement, and neither of the parties shall be bound by any conditions, definitions, warranties, or representations with respect to the subject matter of this Agreement except as set forth in this Agreement or except as duly set forth on or subsequent to the date hereof in a writing signed by a proper and duly authorized representative of the party to be bound thereby. This Agreement shall not be modified or amended except by a written agreement signed by both parties hereto.

E. Failure of either party to this Agreement to exercise any option or right provided to such party by the terms of this Agreement shall not constitute a waiver of such option or right, or any other option or right.

F. Any and all disputes arising out of and in connection with this Agreement shall be finally settled by arbitration under the rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the Rules. The arbitration shall take place in London, United Kingdom of Great Britain.

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement as of the day and year first above written.

| | |
|---|---|
| WHITE HYDRAULICS, INC. | SAUER GETRIEBE KG |
| By: /s/ HARVEY C. WHITE<br>Harvey C. White<br>President | By: /s/ (ILLEGIBLE) |
| Attest: /s/ HOLLIS N. WHITE, JR.<br>Hollis N. White, Jr.<br>Secretary | And: /s/ (ILLEGIBLE) |

## SCHEDULE A

Exclusive Territory

Aden
Africa
Albania
Andorra
Arab Emirate
Austria
Belgium
Bulgaria
Cyprus
Czechoslovakia
Denmark
Finland
France
East Germany
(including East Berlin)
West Germany
(including West Berlin)
Greece
Hungary
Iceland
Republic of Eire
Iran
Iraq
Israel
Italy
Jordan
Kuwait
Lebanon
Liechtenstein
Luxemburg
Monaco
Netherlands
Norway
Poland
Portugal
Romania
San Marino
Saudi Arabia
Spain
South Yemen
Sweden
Switzerland
Syria
Union of Socialist Soviet
Republic
United Kingdom of Great
Britain and Northern
Ireland
Turkey
Vatican City
Yemen
Yugoslavia

## COMPLAINT FILED IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA

(Filed August 11, 1981)

File No. L81 0056

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA

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SAUER-GETRIEBE KG,
*Plaintiff,*

v.

WHITE HYDRAULICS, INC., HARVEY C. WHITE, and HOLLIS N. WHITE, JR.,
*Defendants.*

---

VERIFIED COMPLAINT

1. Plaintiff, SAUER-GETRIEBE KG, is a limited partnership, organized and existing under the laws of the Federal Republic of West Germany, with a principal place of business in the Federal Republic of West Germany. The Plaintiff's partners are corporations organized and existing under the Federal Republic of West Germany, whose principal places of business are in the Federal Republic of West Germany.

**[2]** 2. Defendant WHITE HYDRAULICS, INC., is a corporation organized and existing under the laws of the State of Indiana, with a principal place of business in Lafayette, Indiana.

3. Defendants, HARVEY C. WHITE and HOLLIS N. WHITE, JR., are the President and Secretary, respectively, of the defendant corporation, WHITE HYDRAULICS, INC., and own and control a majority of all the shares of the said WHITE HYDRAULICS, INC.

4. Jurisdiction in this matter is based on diversity of citizenship. The amount in controversy exceeds ten thousand ($10,000) dollars, exclusive of interests and costs.

5. On June 29th, 1979, SAUER-GETRIEBE KG and WHITE HYDRAULICS, INC. entered into a contract in which WHITE HYDRAULICS, INC. agreed, *inter alia*, to sell to SAUER-GETRIEBE KG hydraulic motors developed and manufactured by WHITE HYDRAULICS, INC., and to convey to SAUER-GETRIEBE KG certain manufacturing rights, which are the rights under WHITE HYDRAULICS, INC.'s patent rights and trade secrets to manufacture and sell said motors in an exclusive sales territory. A copy of said contract is attached hereto as EXHIBIT "A."

6. In conjunction with the rights granted to SAUER-GETRIEBE KG under the contract, WHITE HYDRAULICS, INC. also agreed to convey [3] along with the patent rights and trade secrets, reference prints, sales aids, and engineering and technical know-how necessary to manufacture and market said motors.

7. On July 21st, 1981, WHITE HYDRAULICS, INC. repudiated said contract and informed SAUER-GETRIEBE KG that it was negotiating with a third party for the sale of the corporation assets, including the manufacturing rights, patent rights, trade secrets, and other rights of SAUER-GETRIEBE's under the contract.

8. Up to the time of such repudiation and refusal, Plaintiff had duly performed all of the conditions of such

contract on its part, and at the time of such repudiation, was ready, able and willing, and duly offered to continue the due performance thereof.

9. SAUER-GETRIEBE's rights under the contract are unique and unobtainable elsewhere and give Plaintiff the legal right to demand specific performance of that contract.

10. Article VIII, paragraph F, of the contract provides that all disputes arising out of or in connection with the agreement shall be finally settled by arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce.

11. Under the Rules of the International Chamber of Commerce [4] any party to a contract may request emergency interim relief from any court of competent jurisdiction before or after the submission of the case to the arbitrator.

12. SAUER-GETRIEBE KG intends to submit the matter of Defendant's breach to the Arbitration Panel and to seek specific performance of the contract.

13. SAUER-GETRIEBE KG will suffer irreparable injury if Defendant is not enjoined from repudiating the contract and transferring SAUER-GETRIEBE's rights to a third party.

14. SAUER-GETRIEBE KG has no adequate remedy at law to prevent the repudiation of its contract rights and the irreparable harm that will result from said repudiation.

WHEREFORE, Plaintiff demands:

(1) that the Court issue a preliminary injunction preventing Defendant from repudiating the contract and from transferring any of SAUER-GETRIEBE's rights un-

der that contract to a third party during the pendency of the present action.

(2) that the Court issue a permanent injunction preventing Defendant from repudiating the contract and from transferring any of SAUER-GETRIEBE's rights under that contract to a third party [5] until such time as the respective rights of the parties under the agreement are determined by the Arbitration Panel of the International Chamber of Commerce.

(3) that the Court grant any other relief which shall appear to be just and proper.

OLIVER, PRICE AND RHODES

By /s/ KENNETH A. RHODES
Kenneth A. Rhodes, Esquire

By /s/ JOSEPH A. O'BRIEN
Joseph A. O'Brien, Esquire
*Counsel for the Plaintiff*

STATE OF INDIANA:

ss.

COUNTY OF .....:

JUERGEN HELWIG, being duly sworn according to law, deposes and says that he is authorized to make this affidavit for and on behalf of the Plaintiff corporation, SAUER-GETRIEBE KG, and that the facts set forth in the foregoing COMPLAINT are true and correct.

JUERGEN HELWIG

SWORN TO AND SUBSCRIBED
BEFORE ME THIS DAY
OF AUGUST A.D. 1981.

.....
NOTARY PUBLIC

## ANSWER AND COUNTERCLAIM FILED IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA

(Filed August 24, 1981)

Civil Action No: L 81-0056

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

SAUER-GETRIEBE KG,
*Plaintiff,*

v.

WHITE HYDRAULICS, INC., HARVEY C. WHITE, and HOLLIS N. WHITE, JR.,
*Defendants.*

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ANSWER AND COUNTERCLAIM
*ANSWER*

For their Answer to the Complaint, in respect to each numbered paragraph thereof, the Defendants deny, state and admit as follows:

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted.

5. It is admitted that on or about June 29, 1979 the Plaintiff, Sauer-Getriebe KG (hereinafter referred to as SAUER) entered into the contract of which a copy is at-

tached to the Complaint as "Exhibit A". The terms of said contract are as set forth in the copy. Except as herein admitted, the allegations of paragraph 5 are denied.

6. The terms of said contract of June 29, 1979 are as set forth in the copy, "Exhibit A". Except as herein admitted, the allegations of paragraph 6 are denied.

7. On or about July 10, 1981, SAUER was advised that Harvey C. White and Hollis N. White were contemplating the sale of their stock in White Hydraulics, Inc. (hereinafter referred to as WHITE HYDRAULICS) to a third party. Except as herein admitted, the allegations of paragraph 7 are denied.

[2] 8. It is denied that there was a repudiation and refusal of the said contract of June 29, 1979, and it is denied that Plaintiff performed under the contract as expected and contemplated by WHITE HYDRAULICS.

9. It is denied that SAUER is entitled to demand specific performance of said contract of June 29, 1979.

10. It is admitted that said contract of June 29, 1979 contains the terms set forth in Article VIII, Paragraph F. It alleged that SAUER has waived the provision for arbitration as set forth in said Article VIII, Paragraph F by electing to bring this present action.

11. The terms of the Rules of the International Chamber of Commerce are as may be found in a copy of those Rules. Except as herein admitted, the allegations of paragraph 11 are denied for want of knowledge.

12. The intention of SAUER as stated in paragraph 12 is duly noted. The Defendants allege that the proposed arbitration has been waived by the filing of this action by SAUER. It is denied that the indicated arbitrator possesses the jurisdiction and the authority to rule upon issues of

law, including contract law and anti-trust law under American jurisprudence.

13. Denied.

14. Denied.

*AFFIRMATIVE DEFENSES*

Further answering the Complaint, the Defendants state and allege:

15. Said contract of June 29, 1979 is invalid, void, of no effect, and unenforceable for the reason that it is vague, uncertain and indefinite in several respects, including:

[3] (a) The term during which SAUER shall be obligated to buy subject Motors from WHITE HYDRAULICS, after an unfavorable rate of currency exchange has occurred as provided in Article II, paragraph C-1, is not certain nor reasonably ascertainable;

(b) The term during which SAUER may exercise "its manufacturing rights" under the provisions of Article III, paragraph B, is not certain nor reasonably ascertainable;

(c) The time at which WHITE HYDRAULICS is bound to make trade secrets available to SAUER is not certain nor reasonably ascertainable under the provisions of Article III, paragraph B-2; and

(d) The identity, nature and scope of the trade secrets to be made available to SAUER under the provisions of Article III, paragraph B-2 (a), (b) and (c) are not certain nor reasonably ascertainable.

16. Said contract of June 29, 1979 is invalid, void, of no effect, and unenforceable in that the covenants thereof

are not supported by good and valid consideration in several respects, including:

(a) The failure of SAUER to agree to purchase subject Motors from WHITE HYDRAULICS, although Article II, paragraph A, expresses an "intent" to purchase 50,000 Motors;

(b) The lack of consideration for the covenant of WHITE HYDRAULICS not to sell the subject Motors in the territory allotted to SAUER after SAUER is excused from [4] purchasing Motors from WHITE HYDRAULICS after the occurrence of an unfavorable currency exchange as provided for in Article II, paragraph C-1; and

(c) The lack of consideration for the covenant of WHITE HYDRAULICS not to sell the Motors in the territory allotted to SAUER after the occurrence of the imposition of unfavorable customs duties as provided in Article II, paragraph C-2.

17. Said contract of June 29, 1979 is unenforceable in a Court of Equity and is not to be recognized for the reason that the said contract is unconscionable and inequitable in nature in foreclosing WHITE HYDRAULICS from selling subject Motors in the territory allotted to SAUER while at the same time not requiring SAUER to purchase subject Motors after the occurrence of an unfavorable currency exchange as set forth in Article II, paragraph C-1 and after the occurrence of the imposition of unfavorable customs duties as set forth in Article II, paragraph C-2.

18. The said contract of June 29, 1979 may be illegal and hence unenforceable upon being interpreted to be an agreement in restraint of trade or commerce with

foreign nations contrary to the provisions of Title 15, Section 1 of the United States Code, in that upon the occurrence of the unfavorable currency exchange as set forth in Title II, paragraph C-1, and after the occurrence of the imposition of unfavorable customs duties as set forth in Article II, paragraph C-2, trade in subject Motors between the United States and nations in the territory allotted to SAUER would be barred and prohibited.

WHEREFORE, the Defendants pray that the Complaint be dismissed for want of merit, and for an award of costs including their reasonable attorneys' fees.

*COUNTERCLAIM*
*FOR DECLARATORY JUDGMENT*

This Counterclaim is authorized by the provisions of Rule 13 of the Federal Rules of Civil Procedure.

19. The parties to this Counterclaim are as identified in the Complaint.

20. Jurisdiction over this Counterclaim is based on the provisions of 28 USC 1332 and 28 USC 2201.

21. There is an actual and present controversy between the parties as to the issues of validity and enforceability of said Contract of June 29, 1979 and upon the interpretation thereof, all as set forth and evidenced by the Complaint and Answer, and Defendants require and request a judicial declaration upon said issues determining the validity and enforceability of said Contract and ruling upon the interpretation of the same in order that Defendants may plan and conduct their business and affairs without intrusion and interference by SAUER through this litigation, and to be free from harassment imposed by the charges made in the Complaint and resulting damage to their reputations.

WHEREFORE, Defendants pray for a judgment in their favor dismissing the Complaint and rendering an award in favor of Defendants upon said issues upon which a declaratory judgment is here sought, together with an award of costs including reasonable attorneys' fees, and such other relief as may appear appropriate and just upon a trial of this action.

WHITE HYDRAULICS, INC.
HARVEY C. WHITE, and
HOLLIS N. WHITE, JR.,

*Defendants*

*By Their Attorneys:*

/s/ JOSEPH T. BUMBLEBURG
BALL, EGGLESTON, BUMBLEBURG & MCBRIDE
Purdue National Bank Building
P.O. Box 1535
Lafayette, IND. 47902
(317) 742-9046

*Of Counsel:*

/s/ CHARLES R. RUST
BRUCE B. KROST
WOODLING, KROST & RUST
655 Union Commerce Building
Cleveland, Ohio 44115
(216) 241-4150

CERTIFICATE OF SERVICE

I certify that on the 24 day of Aug, 1981 service of a true and complete copy of the above and foregoing pleading or paper was made upon each party or attorney of record herein by depositing the same in the United States mail in envelopes properly addressed to each of them and with sufficient first class postage affixed.

BALL, EGGLESTON, BUMBLEBURG
& MCBRIDE
By /s/ J. T. BUMBLEBURG

## REPLY TO COUNTERCLAIM FILED IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA

Civil No. L 81 0056

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

SAUER-GETRIEBE KG

VS.

WHITE HYDRAULICS, INC., *et al.*

REPLY OF SAUER-GETRIEBE KG TO COUNTERCLAIM OF DEFENDANT

19. Admitted.

20. Denied.

21. Denied.

*Affirmative Defenses*

1. The Court lacks jurisdiction over the subject matter of the Counterclaim.

2. The Counterclaim fails to state a claim upon which relief can be granted.

3. The Court lacks jurisdiction over the counterclaim inasmuch as disputes concerning the validity of the contract are arbitrable and pursuant to ARTICLE VIII, paragraph F of the contract such disputes must be settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce.

OLIVER, PRICE AND RHODES
By JOHN R. O'BRIEN, ESQUIRE
*Counsel for Plaintiff*

# UNREPORTED DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN UNITED CARBIDE AGRICULTURAL PRODUCTS, INC. ET AL. v. WILLIAM D. RUCKELSHAUS ET AL.

(Filed July 28, 1983)

76 Civ. 2913 (RO)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNION CARBIDE AGRICULTURAL PRODUCTS CO., INC., *et al.*,
*Plaintiffs,*

-against-

WILLIAM D. RUCKLESHAUS, as Administrator of the United States Environmental Protection Agency, *et al.*,
*Defendants.*

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OPINION AND ORDER

* * * * *

**[3]** OWEN, *District Judge*

This action arises out of a challenge to the constitutionality of certain aspects of the 1978 amendments to the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y. Specifically, plaintiffs object to the requirement that they disclose their testing data to the public (the "disclosure" provisions) and a second requirement that allows competitors to use such data in support of their own pesticide registrations (the "use" provisions). Defendant is the administrator of the United States Environmental Protection Agency (the

"EPA"). The parties are presently before me on cross-motions for summary judgment. Before I turn to the merits, a review of the statutory history is appropriate.

In 1947, Congress enacted the forerunner of today's FIFRA. At inception, the statute simply required the developer or manufacturer of a pesticide to register its product with the Secretary of Agriculture prior to introducing it into the marketplace. The registration process itself was relatively straightforward, An applicant was required to file its name and address, the name of the pesticide to be registered, a complete copy of the labeling and a statement of the claims made for it, including directions for use, and, if requested by the Secretary, a full description of the tests made and the results upon which any claims were based. The Secretary was also vested with the power to require an applicant to submit the complete formula of its pesticide. If it appeared that its composition was such as to warrant the proposed claims made for it and if it otherwise conformed with the requirements of FIFRA, after reviewing the data submitted the Secretary registered the pesticide. If the Secretary was dissatisfied with the application, the applicant would be provided with notice and an opportunity to correct its deficiencies.

[4] FIFRA was substantially revised in 1972:

> as a response to growing public concern about public health and ecological effects of pesticides. The new FIFRA provided for a more complete registration process and stronger enforcement measures, and heralded a policy of thorough scientific analysis of pesticide chemicals before making them available to the public. Now . . . not only does an applicant for registration have to show his pesticide's composition is such as to warrant the proposed claims made for it and that its

> labeling and other submitted materials comply with the Act before he may obtain a registration but the EPA must also determine that the pesticide will perform its intended function without unreasonable adverse effects on the environment, and that, when used in accordance with widespread and commonly recognized practice, it will not generally cause adverse effects on the environment.

*Mobay Chemical Corp. v. Costle*, 517 F.Supp. 254, 258 (W.D. Pa. 1981) *aff'd in part sub. nom. Mobay Chemical Corp. v. Gorsuch*, 682 F.2d 419 (3rd Cir. 1982).

The 1972 amendments still required persons applying to register pesticides to submit extensive testing data in support of their registrations but allowed them to retain certain proprietary rights in their data even after submission. To this end, former section 10(a) permitted data submitters to designate portions of their data as either trade secrets or commercial or financial information, and former section 10(b) prohibited the EPA from disclosing those portions.

The 1972 amendments also allowed data submitters certain rights of compensation. Thus, the EPA was prohibited from using publicly available data it had received in support of one pesticide registration to support the registration of another pesticide unless the subsequent data user first offered to pay reasonable compensation to the original data submitter. Where possible, the level of compensation was to be negotiated by the original data submitter and the data user. Where agreement could not be reached, the EPA retained the power to set [5] the level of compensation. The original data submitter, however, retained the right to appeal this determination to the federal district court.

Such a compensated use program had benefits for both the EPA and for registrants. It increased administrative efficiency by allowing the EPA to rely on already approved testing techniques and it benefited original data submitters by mandating compensation when their data was used by another registrant.

The 1978 amendments to FIFRA were enacted in response to certain problems which had arisen following the enactment of the 1972 revisions. Among these difficulties was the practice adopted by many data submitters of designating large portions of their data as "trade secret" material in order to avoid subsequent disclosure. Obviously, this tactic precluded the EPA's use of their data to support the registrations of competing pesticide manufacturers. As a result, the trade secret provisions both limited the EPA's efficient management of its registration process and undercut the compensation program envisioned by the drafters.

Pursuant to the 1978 amendments, all applicants are no longer required to make the extensive filings previously mandated. Rather, applicants must now file either "a full description of the tests made and the results thereof upon which the claims are based or, alternatively, a citation to data that appear in the public literature or that previously had been submitted to the Administrator. . . ." 7 U.S.C. § 136a(c)(1)(D).

Moreover, although the original data submitter still retains certain proprietary rights in the data which it has submitted, those rights have been significantly altered. New section 3(c)(1)(D) no longer permits a data submitter to invoke trade secret protection. 7 U.S.C. § 136a(c)(1)(D). Rather, it divides all submitted data into three parts. Thus,

(1) *with respect to pesticides containing active ingredients that are initially registered after September 30,* **[6]** *1978,* the original data submitter is entitled to a period of exclusive use of that data for registration purposes for a period of 10 years;

(2) *with respect to data submitted after December 31, 1969 and not subject to the exclusive use provisions set forth above,* the EPA may use such data in its consideration of the registration applications of applicants other than the original data submitter for a period of 15 years if the applicant has made an offer to compensate the original data submitter. The terms and amounts of compensation are to be set by the parties themselves. Should they fail to reach agreement on compensation, either party may initiate binding arbitration proceedings. The arbitrator's findings and determinations are not reviewable by the federal courts except for fraud, misrepresentation, or other misconduct; and

(3) *with respect to data which is not subject to either the exclusive or the compensated use provision,* the EPA may use data provided by an original data submitter in support of the registration of another applicant without the permission of the original submitter and without an offer of compensation being made.

In sum, the new program allows the developer of new "active ingredients" the exclusive use of its data for a period of ten years and compensated use for a period of five years following the termination of the exclusive use period. It allows registrants of data not qualifying for a period of exclusive use a fifteen-year period of compensated use. And finally, it provides for neither exclusive nor compensated use fifteen years after registration.

In addition to these new use provisions, the 1978 amendments impose new disclosure requirements on registrants. As I mentioned above, under the earlier law registrants were allowed to shield much of their filed data by designating portions thereof as trade secrets. The new section 10(d), 7 U.S.C. § 136h(d), "authorizes the public disclosure of all information concerning the objectives, methodology, results, or significance of any test performed on or with a pesticide, and of any residue, environmental chemistry, safety, toxicology, metabolism, and fish and wildlife data." *Mobay Chemical Corp. v. Costle, supra,* 517 F.Supp. at 260. Three significant classes of information, however, remain [7] protected from disclosure "unless the Administrator has first determined that disclosure is necessary to protect against an unreasonable risk, or injury to health or environment," 7 U.S.C. § 136h(d)(1):

> (A) [information that] discloses manufacturing or quality control processes,
>
> (B) [information that] discloses the details of any methods for testing, detecting, or measuring the quantity of any deliberately inert ingredient of a pesticide, or
>
> (C) [information that] discloses the quantity of any deliberately added inert ingredient of a pesticide.

7 U.S.C. § 136h(d)(1). The use of data made available pursuant to this section for purposes of registration is governed by § 3(c)(1)(D), as set forth above.

In their complaint, plaintiffs attack two aspects of the 1978 FIFRA amendments. First, plaintiffs challenge new section 10 of FIFRA, 7 U.S.C. § 136h—the "disclosure" provision—which allows the EPA to disclose certain informa-

tion to the public which had been submitted by plaintiffs prior to 1978 and which prior to that date had been insulated from public disclosure by the trade secret protections of the predecessor act. Plaintiffs contend that this disclosure provision is a retroactive deprivation of plaintiffs' property rights in their trade secret data in violation of due process of law. Second, plaintiffs challenge new section 3(c)(1)(D) of FIFRA, 7 U.S.C. § 136a(c)(1)(D)—the "use" provision—which permits the compensated use of plaintiffs' research data by other registrants to support their own federal pesticide registrations. Plaintiffs contend that the compensated use requirement, coupled with the particular arbitration remedy provided in the statute, is improper as an unconstitutional delegation of legislative power to the private arbitrators and, alternatively, is a violation of the Constitution insofar as it deprives the judiciary of its traditional Article III function.

**[8]** Defendant, by its cross-motion for summary judgment, contends that these sections withstand constitutional scrutiny. I first consider the "disclosure" provision before turning to the "use" section.

*The Disclosure Requirement*[1]

As the preceding discussion indicates, prior to 1978, after submitting data in support of their products, pesticide registrants could then designate certain portions of their submissions as trade secret material. Once so designated, data was protected from disclosure by former section 10(b). The 1978 amendments, however, introduced a new program which strongly favors disclosure. Pursuant to new section 10(d), "all information concerning the objectives, methodology, results or significance of any test or experiment" submitted in support of a registration is subject to disclosure except insofar as that information may

be protected by certain narrowly drawn exceptions. Thus, the new program affects all data in one of two ways. As to data submitted after the passage of the 1978 amendments, pesticide registrants are on notice that they are relinquishing their expectations to trade secret protection except as narrowly preserved by the statute itself. As to data submitted prior to 1978, the amendments operate more onerously. The expectation fostered by the pre-1978 statute that data designated as trade secret material will be withheld from public disclosure no longer obtains. Only so much of the once-protected data as falls within the statutory exception remains protected from disclosure. The rest, even though it was once secret and even though it may have been submitted with the expectation that it would not be disclosed, is publicly available.

Plaintiffs challenge the retroactive effect of the 1978 amendments to section 10, 7 U.S.C. § 136h(d), and claim that the pre-1978 statute created the expectation that data designated "trade secret" would be preserved from disclosure and that this expectation fostered by statute constituted a "vested right." [9] Plaintiffs further contend that the retroactive deprivation of this expectation divests them of their property without due process of law. They contend in addition, that this "retroactive application is so harsh and oppressive as to transgress the constitutional [due process] limitation." *Welch v. Henry*, 305 U.S. 134, 147 (1938).

Plaintiffs do not contest the new disclosure requirements as they apply to data submitted after the enactment of the 1978 amendments. As the Supreme Court commented in an analogous context:

> [I]t is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what

> it is that is being sold. The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the state, in the exercise of its police power and in promotion of fair dealings, to require that the nature of the product be fairly set forth.

*Corn Products Refining Co. v. Eddy*, 249 U.S. 427, 431-32 (1919); *see, also, National Fertilizers Ass'n v. Bradley*, 301 U.S. 178 (1937). "Further, [l]egislative acts adjusting the burdens and benefits of economic life come . . . with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Even legislation that has retroactive applicability "is not unlawful solely because it upsets otherwise settled expectation." 428 U.S. at 16. "The retroactive aspects [however] must meet the test of due process, and the justifications for the latter may not suffice for the former." 427 U.S. at 17. Thus, the constitutionality of the disclosure provisions must be judged by the standard due process test. If the challenged legislation bears a rational relation to the evil which it seeks to remedy, I may look no further. *Williamson v. Lee Optical Co.*, 348 U.S. 487 (1955).

[10] I conclude that the disclosure requirements embodied in section 10(d) 7 U.S.C. § 136h(d), are neither arbitrary nor irrational. FIFRA was revised in 1972 to accommodate the increasing public interest in the regulation of products which affect the environment with the interest of pesticide manufacturers in protecting costly research data from acquisitive competitors. FIFRA was amended again in 1978 to adjust the balance struck in 1972 when it became apparent that the statutory goal of granting the

public access to the data from which they could conduct their own evaluations of new pesticides fell short of achievement by reason of registrants' ability to designate certain portions of their data as trade secrets. That the amendments could have been better drawn or if they upset settled expectations, is of no consequence. The Constitution does not require perfect economic regulation. It only requires that legislation not be arbitrary or irrational. The disclosure provisions meet that standard. Defendant's motion for summary judgment on this issue is therefore granted.

*The Compensation-Arbitration Provisions*[2]

Plaintiffs also challenge the compensation provisions of the amended statute. Section 3(c)(1)(D), 7 U.S.C. § 136a(c)(1)(D),[3] the focus of plaintiffs' complaint, calls for the data user, in the first instance, to make a compensation offer. If the data submitter does not accept that offer within 90 days and the parties have not agreed on a procedure to determine compensation, either the data user or the data submitter may then initiate binding arbitration proceedings. The statute, however, sets no guidelines or standards for the fixing of compensation. Moreover, it provides that "the findings and determination of the arbitrator shall be final and conclusive" and that

> [11] no official or court of the United States shall have power or jurisdiction to review any such findings and determination, except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator. . . .

Plaintiffs challenge the constitutionality of this provision on two grounds. First, they contend that the compensation-arbitration procedure is an unlawfully overbroad delegation because it (1) contains no standards for de-

cision-making, (2) fails to set forth any system through which coherent standards can be developed, and (3) restricts sufficient access to judicial or administrative review. *See Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). And second, they contend that the arbitration-compensation procedure impermissibly intrudes on areas of decision-making constitutionally entrusted to the judiciary. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ..... U.S. ....., 50 U.S.L.W. 4892 (June 28, 1982). While plaintiffs appear correct in their contention that this is a standardless delegation of powers, what is dispositive here is the fact that the proposed arbitration procedure commits to arbitrators the power to resolve valuation issues utterly without judicial review. This absolute assignment of power to arbitrators is an impermissible intrusion on the judiciary.

**[12]** In *Northern Pipeline*, the Supreme Court held that although the Congress possesses substantial discretion to create substantive federal rights and to tailor the manner in which they may be adjudicated, including the assignment to an adjunct of some functions historically performed by judges . . .[,] the functions of the adjunct must be limited in such a way that 'the essential attributes' of judicial power are retained in the Art. III court." 50 U.S.L.W. at 4900. There can be no question that on its very face § 3(c)(1)(D) fails to abide by this limitation. *Accord, Monsanto Company v. Acting Administrator*, No. 79-366C (E.D. Mo. April 19, 1983).

The use-compensation system utterly deprives the federal courts of any meaningful role in ensuring the provision of fair compensation to data submitters. The courts play no role in fact-finding. More importantly, however, they are barred from considering any matters of law aris-

ing from the substantive issues in dispute in an arbitration proceeding. Rather, their powers are limited to review for "fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator." This leaves the courts with no power to make any "informed, final determination" of a data submitter's right to compensation. Such an assignment of powers to arbitrators cannot be sustained in the face of Article III.

Submit order on notice effecutating the foregoing.

/s (ILLEGIBLE)
*United States District Judge*

FOOTNOTES

1. Plaintiffs have requested that the court postpone determination of this aspect of the motions because of the pendency of proposed legislation which would restructure the disclosure provisions in the statute. Insofar as that legislation does not appear to be substantially closer to enactment today than it was on the day that plaintiffs first made their request, that application is denied.

2. Defendant contends that plaintiffs' challenge to the arbitration provisions in FIFRA are premature and that plaintiffs lack standing. I disagree and hold that they have presented a justiciable "case or controversy."

In order to demonstrate standing, a claimant must show "injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Duke Power Co. v. Caroline Environmental Study Group*, 438 U.S. 59, 79. That second component may also be determined by resolving "whether the interest sought to be protected is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970).

In this instance, the inquiry therefore focuses on whether plaintiffs are suffering injury in fact by the operation of the arbitration requirements and whether "there is a 'substantial likelihood' that the relief requested will redress the injury claimed." *Duke Power Co. v. Caroline Environmental Study Group*, 438 U.S. at 75 n.2. Plaintiffs here would describe their alleged injury in terms of the statutory compulsion to participate in an arbitration procedure that is void *ab initio* as a matter of law and the deprivation thereby of any access to meaningful compensation for the use of their data by subsequent registrants. The Constitution requires only that the plaintiffs allege a "distinct and palpable injury" to satisfy the first component of the test. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). The compulsion to arbitrate satisfies that component. Moreover, the second component is more easily satisfied. Where the Constitution requires only "a 'fairly traceable' causal connection between the claimed injury and the challenged conduct," *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. at 72, *quoting Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 261 (1977), plaintiffs' injuries here would be the direct product of the statutory plan. Plaintiffs are clearly within the zone of interest regulated by the use provisions.

Defendants also contend that plaintiffs' challenge to arbitration is not yet ripe for judicial review, i.e., whether an abstract or a concrete question is before the court. "The difference between an abstract question and a 'case or controversy' is one of degree, of course, and is not discernible by any precise test." *Babbit v. United Farm Workers*, 442 U.S. 289, 297 (1979). Here that question is best settled by inquiring into what profit there

would be in the court's waiting for a later date. Defendant contends that this action will not be ripe for resolution until arbitration has produced results unfair to plaintiffs or at least until arbitration has been commenced. Nevertheless, it is not the results of any arbitration procedure that plaintiffs protest, or even the internal procedure thereof, rather it is the statutory compulsion to seek relief through arbitration to the exclusion of any other mechanism. That issue is clearly ripe for resolution.

3. Section 3(c)(1)(D) states, in pertinent part:

> Each applicant for registration of a pesticide shall file with the Administrator a statement which includes . . .
>
> (D) . . . a full description of the tests made and the results thereof upon which the claims are based, or alternatively a citation to data that appear in the public literature or that previously had been submitted to the Administrator and that the Administrator may consider in accordance with the following provisions:
>
> (i) With respect to pesticides containing active ingredients that are initially registered under this subchapter after September 30, 1978, data submitted to support the application for the original registration of the pesticide, or an application for an amendment adding any new use to the registration and that pertains solely to such new use, shall not without the written permission of the original data submitted, be considered by the Administrator to support an application by another person during a period of ten years following the date the Administrator first registers the pesticide:
>
> Provided, That such permission shall not be required in the case of defensive data;
>
> (ii) except as otherwise provided in subparagraph (D)(i) of this paragraph, with respect to data submitted after December 31, 1969, by an applicant or registrant to support an application for registration, experimental use permit, or amendment adding a new use to an existing registration, to support or maintain in effect an existing registration, or for reregistration, the Administrator may, without the permission of the original data submitter, consider any such item of data in support of an application by any other person (hereinafter in this subparagraph referred to as the "applicant") within the fifteen-year period following the date the data were originally submitted only if the applicant has made an offer to compensate the original data submitter and submitted such offer to the Administrator accompanied by evidence of delivery to the original data submitter of the offer. The terms and amount of compensation may be fixed by agreement between

the original data submitter and the applicant, or, failing such agreement, binding arbitration under this subparagraph. If, at the end of ninety days after the date of delivery to the original data submitter of the offer to compensate, the original data submitter and the applicant have neither agreed on the amount and terms of compensation nor on a procedure for reaching an agreement on the amount and terms of compensation, either person may initiate binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from the roster of arbitrators maintained by such Service. The procedure and rules of the Service shall be applicable to the selection of such arbitrator and to such arbitration proceedings, and the findings and determination of the arbitrator shall be final and conclusive, and no official or court of the United States shall have power or jurisdiction to review any such findings and determination, except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator where there is a verified complaint with supporting affidavits attesting to specific instances of such fraud, misrepresentation, or other misconduct.

4. Courts confronted with the questions whether there is a property right in submitted testing data and whether, if there is, the statutory program constitutes a "taking" have reached differing conclusions. *Compare Monsanto Company v. Acting Administrator*, No. 79-366 C. (E.D. Mo. April 19, 1983), *with Mobay Chemical Corp. v. Gorsuch*, 682 F.2d 419 (3rd Cir. 1982), *affirming in part, Mobay Chemical Corp. v. Costle*, 517 F.Supp. 254 (W.D.Pa. 1981), *with Petrolite Corp. v. EPA*, 519 F.Supp. 996 (D.D.C. 1981); *cf., Union Carbide Agricultural Products Co., Inc. v. Costle*, 632 F.2d 1014 (2d Cir. 1980).

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